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ABSTRACT

The background out of which "truth in testing" legislation arose is reviewed in this report, which also describes existing state and federal testing legislation, details arguments raised in hearings on the legislation, analyzes the legal issues raised, and provides a framework for simplifying the arguments and gathering more information. At the center of the debate are two definitions of fairness. On one side are the proponents of disclosure of the test instruments and results: on the other side are those who argue that test security ensures fairness. Proponents of the legislation believe that the principle of fairness outweighs technical objections to open testing. Opponents feel that supporters of the legislation should shoulder the burden of proof that the law is necessary. Issues related to the testing controversy include: the role and power of American testing organizations: the nature, quality, and use of standardized tests: and the consequences of government interference. Also discussed are the legislation itself, its legal implications (constitutional, due process, copyright, freedom of information), initial impact, and strategies for evaluating the debate. Appended are the texts of the Gibbons Bill (H.R. 3564--the "Truth in Testing Act of 1979"), the Weiss Bill (H.R. 4949--the "Educational Testing Act of 1979"), and the California and New York state laws pertaining to admissions testing. (MSE)

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SEARCHING FOR THE TRUTH ABOUT "TRUTH IN TESTING" LEGISLATION

A Background Report

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EDUCATION COMMISSION OF THE STATES

SEARCHING FOR THE TRUTH ABOUT "TRUTH IN TESTING" LEGISLATION

A Background Report

By Rexford Brown
With Legal Analysis by Merle Steven McClung

Report No. 132

Education Commission of the States
Denver, Colorado
Warren G. Hill, Executive Director

January 1980

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PREFACE

At the August 1979 annual meeting of the Education Commission of the States, a resolution was passed directing the staff ". . . to undertake a study of the intent and implications of recent state actions and legislation pending in Congress to open the testing process to public scrutiny." With the assistance of a small grant from the Ford Foundation, the study was initiated in October under the direction of the Department of Postsecondary Education. The authors reviewed positions of the proponents and opponents of legislation, the content of existing and proposed state and federal legislation and analysis of the legal and other issues raised by the laws. Copies of the draft report were distributed to some 40 reviewers, including the major representatives of both sides of the issues. Their comments and suggestions have been incorporated in this final draft.

We are grateful to the National Assessment of Educational Progress (NAEP) for the loan of Rexford Brown, NAEP Director of Publications and User Products, who served as primary author and editor for the report. Merle Steven McClung, Director of the ECS Law and Education Center, provided the legal analysis of the implications of the enacted and proposed legislation.

Richard M. Millard
Director, Department of
Postsecondary Education

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EXECUTIVE SUMMARY

This report, prepared by the Education Commission of the States, sketches the background out of which "truth in testing" legislation arose, describes existing state and federal testing legislation, details arguments raised in hearings on the legislation, analyzes the legal issues raised by the legislation and provides a framework for simplifying the arguments and gathering more information about important contentions. The report is not a policy statement; rather, it is intended to provide enough background to prepare legislators confronting the issue for the major points they can expect to see raised in discussions and hearings.

At the center of the debate are two definitions of "fairness." On one side are the proponents of disclosure legislation, who argue that as a matter of simple fairness students should be able to see the test instrument (including the questions, the answers and related test data) used to make important decisions about their lives. Proponents feel that tests are social policy instruments that should, in a democratic society, be open to scrutiny. On the other side, the opponents of legislation argue that test security insures fairness, so disclosure of the tests will, by breaching security, affect the validity of the tests, increase the costs and lessen confidence in standardized tests, all of which will erode fairness in decisions made about students. They feel that secure standardized tests give everyone an equal chance and are more democratic instruments for policy making than are alternatives that permit the intrusion of various biases.

Proponents of the legislation believe that the principle of fairness outweighs technical objections to open testing. They believe that security is not essential for test validity and that the burden of proof rests upon the test companies. Specifically, they ask that the test companies prove their allegations that full disclosure will weaken test validity, increase development costs, exhaust the number of test questions that can be asked, erode confidence in tests and lead to a climate of more unfairness in decisions that involve test scores.

Opponents of the legislation believe that the burden of proof that a law is necessary rests upon the supporters of testing legislation. Specifically, they ask for proof that a substantial problem with test use or abuse exists, that the legislation will correct any misuses and abuses, that open testing is technically feasible and that substantial benefits accrue to individuals and society through test disclosure that are not offset by government intrusion and potential damage to standardized testing and admissions procedures.

These two public interests must be balanced against one another. In addition, circling around them are a host of related issues (summarized in Exhibit 1, page xi). There are arguments about the role and power of American testing companies. There are arguments about the nature, quality, use and misuse of standardized tests in general and tests used for admissions decisions. There are arguments about the consequences of government interference in this area. The debate will continue as state bills are considered and the federal legislation surfaces again in the 1980 Congressional session. New laws, compromises, amendments to laws and court decisions will clarify the situation in coming months. There is no reason to discourage states from considering this issue, but there is every reason to encourage them to do so comprehensively, listening carefully to both sides and watching developments in New York and elsewhere.

INTRODUCTION

The following report attempts to clarify important positions taken for or against legislation aimed at standardized tests. It begins by placing the "truth in testing" issue in its social and historical context. Then it examines the testing legislation itself and its legal and practical implications for such important groups as educators, test developers, admissions officers and, of course, the millions of students and adults who are tested every day in America. Before launching into the debate, however, we should be clear about the particulars of the legislation at the heart of the controversy. The first law requiring test publishers to disclose information to test takers and the public was California's SB 2005, enacted in September 1978. The law applies to any standardized test used for postsecondary education admissions selection and given to more than 3,000 students — in other words, such tests as the Scholastic Aptitude Test (SAT) and the American College Testing (ACT) Assessment. The law requires that a test's sponsor must file with the California Postsecondary Education Commission various kinds of data describing the test's features, limitations and use; must provide test takers with various kinds of information about a test and how it will be used; and must submit data about the administration of the test, the income realized and the expenses incurred in its administration.

A second state law was enacted in New York in 1979. Like the California law, it applies only to tests used for postsecondary or professional school admissions and requires test publishers to file background reports about their tests and provide test takers with ample information. In addition, the New York law requires the test agencies to file the contents of the tests with the New York Commissioner of Education within 30 days of release of scores, and, thereafter, provide them to test takers upon request. Further detail about these laws appears in Table 1, pg. 17, later in this report.

In addition to these laws, similar bills — some requiring total disclosure of the test (such as the New York bill stipulates), some not — have been filed in Florida, Maryland, Ohio, Texas, Colorado, Massachusetts, Pennsylvania and New Jersey (Table 2), pg. 19, although none has yet been enacted. Other state bills appear to be imminent. Two federal bills also were introduced in 1979 — the "Truth in Testing Act of 1979," known as the Gibbons Bill or H.R. 3564, and the "Education Testing Act of 1979," known as the Weiss Bill, or H.R. 4949. The former covers achievement and occupational tests as well as admissions tests, but does not require total disclosure; the latter is limited to admissions tests but does require total disclosure, as well as a number of other requirements. These bills are detailed in Table 3, pg. 25.

All but two of the bills introduced apply to postsecondary education admissions testing only — not to standardized achievement tests in areas such as reading and history; personality or diagnostic tests; or minimal competency exams (although Massachusetts requires total disclosure of its competency tests). With the exception of the Gibbons Bill, they do not apply to occupational testing, civil service or licensing examinations. The New Jersey bill applies to all tests "developed by a test agency for the purpose of selection, placement, classification, graduation or any other bonafide reason concerning pupils in elementary and secondary, postsecondary or professional schools."

The arguments about testing legislation seem to fall into four related but

distinct groups. The first major cluster of arguments centers around the role and power of the testing industry; the second centers around the nature and quality of standardized tests; the third concerns the need for state or federal legislation in this area and the problems with existing or proposed legislation; and the fourth — really a subdivision of the third, but substantial enough to merit separate treatment — centers around the consequences of the full disclosure provisions specified in several of the proposed and enacted laws. These arguments are summarized in Exhibit 1 at the end of this introduction.

Within each group of concerns strong, polarized positions tend to dominate. For instance, one is asked to believe that testing companies are too powerful and that they are not particularly powerful at all; that standardized tests are worse than the "subjective" measures they were supposed to replace and that they are far superior to old, biased ways of evaluating people; or that total disclosure of test materials will either improve or destroy standardized tests. Where the clash is most dramatic — in the conflict over disclosure — both sides ironically appeal to the same principle — "fairness." When the major groups of arguments are examined it becomes obvious that the antagonists are seldom drawing upon the same facts, looking at the same aspects of the educational enterprise or subscribing to the same beliefs about the nature and function of education. They are more often arguing at each other than with each other.

Many people within the testing community favor the proposal to make more information about testing available. Many people who dislike massive testing nevertheless oppose government interference or regulation, these bills or aspects of these bills. Even some of the drafters of the bills and laws plan to change specific sections. Much of the technical criticism of tests comes from within the psychometric community itself. Some people who dislike testing are against the legislation because they feel it will only further legitimize it and increase profits. The moral is clear: any summary such as this one will create an illusion of distinct camps, each of which subscribes to everything attributed to either "proponents" or "opponents" of the legislation. This is not the case. Any particular argument for or against tests or the legislation is likely to be supported by some people one would expect to be on "the other side." The following exhibit is intended to put into a nutshell the major arguments that have been advanced for and against testing legislation.

Although there is a certain logic to the way the report is organized, some readers may well want to skip to those parts that interest them most and return to other parts at their leisure. Each issue listed in the exhibit is discussed in the report and can be pursued further through the publications listed in the Bibliography.

Exhibit 1. The Debate About Testing Legislation in a Nutshell

I. Debate About Role and Power of Testing Companies

Antitesting Sentiments	Pro-Testing Sentiments
Tests have profound influence upon American lives and life chances.	Tests have little influence compared to family, social and educational influences, grade point average.
Testing companies are unaccountable to their dependent public – particularly true of the Educational Testing Service (ETS) and American College Testing (ACT).	Commercial test publishers are accountable to market forces; test makers, including ETS and ACT, are accountable to professional standards, education community, higher education communities, courts, client groups, trustees and Internal Revenue Service.
Testing companies are too secretive; test takers do not know enough about tests; researchers cannot study them.	Critics confuse security – a technical issue – with secrecy; ample test information is available both to test takers and qualified researchers.
Massive testing does more harm than good (e.g., consumes time better spent learning, alters curriculum, stigmatizes children, misleads public, etc.).	The public and higher education have asked for massive testing; testing produces information useful for improving education; it does more good than harm (e.g., takes little time, diagnoses problems, helps administrators, etc.).
Tests are inherently biased against pluralism, tend to further stratify society.	The culture is inherently biased; bias in tests is being minimized; don't blame the messenger; testing helps minorities.
Tests are widely misused and misunderstood.	Test companies try hard to curb abuse, educate users.

II. Debate About Quality of Standardized Machine-Scored Tests Used Primarily for Prediction

Critics of Standardized Tests	Defenders of Standardized Tests
Tests concentrate on easily measured cognitive skills, ignoring higher level skills (e.g., problem solving), imagination, creativity, etc.	Society values intellectual achievement, cognitive skills; education (especially higher education) stresses those skills; others (e.g., teachers) are better able to assess imagination, creativity, etc.
Theory upon which testing rests is simplistic, outdated and sketchy.	Theory upon which education rests may be simplistic, outdated and sketchy; test theory is better than critics think and always improving.
Test information is much less precise than testers pretend.	Test information is improving in precision and is better than massive subjectivity.
Tests are seldom valid even by test makers' standards.	Many tests are rigorously validated and most do what they are designed to do.
Tests are developed subjectively and always contain controversial items.	Tests are developed by educators and scholars, some of whom always disagree with others; in the main, they do what they are supposed to do.
Test scores do not predict success in later life.	Test scores accurately predict such things as academic success in first year of college, first year of medical or law school, etc.; they are not designed to predict success in later life.
Formal qualities of multiple-choice tests convey messages that undercut reasoning skills, writing ability, accurate perception of the world.	No empirical data are offered to support such fears; testing consumes too little of a student's time to have such effects.

Exhibit 1. The Debate About Testing Legislation in a Nutshell (cont.)

III. Debate About Need for Testing Legislation

Pro-Legislation Sentiments	Antilegislation Sentiments
Grade inflation, misuse have combined to give tests too much influence in admissions decisions.	Higher education's need for students has lessened importance of admissions test scores.
A commitment to "truth in lending," "truth in advertising," sunshine laws and consumerism should extend to an area as important as admissions testing.	Test publishers and higher education institutions already provide ample information and protection; analogies to consumer movements are misleading.
Because admissions tests have such influence, there is an overriding public interest at stake.	There are several competing public interests at stake; critics have not established an overriding need for legislation.
Legislation will promote greater accuracy, validity of tests.	Legislation calling for full disclosure will lower the quality of tests.
Legislation will encourage use of multiple criteria in selection process.	Most institutions already use multiple criteria and test agencies encourage the practice.
The admissions test industry is not accountable to anyone.	The industry is accountable to the psychometric profession, market forces, academic community.
	Federal legislation would constitute dangerous, if not unconstitutional, federal incursion into education.
	Legislation interferes with First Amendment right of colleges to determine who they want to teach.

IV. Debate About Full Disclosure and Other Aspects of Legislation

Arguments Against Full Disclosure
Students cannot learn much from examining their test items.
Teachers may try to increase aptitude test scores by teaching the test items, thus damaging curriculum.
Full disclosure will compromise test security; compromised security means less confidence in tests.
Release of items will lead to invalid interpretations and misunderstandings.
Accumulation of disclosures over the years will erode test quality and utility.
Good items are the result of a costly, technical and professional process; they should be husbanded to have long life.
Sample tests are sufficient.
It makes more sense to disclose a full specimen of the test before the test taking session, so test taker knows what to expect.
Disclosure will remove economic competitive incentive to create new and better tests.
If admissions officers lose confidence in test scores, disadvantaged students will suffer.
Disclosure means fewer test administrations per year in order to keep a test secure as long as possible.
Disclosure will increase test development costs, thus the cost of tests to students; poorer students will suffer.
Disclosure will decrease amount of time available for development, leading to greater possibility of biased items creeping into tests.
Disclosure will benefit expensive coaching schools, further hurting poor students.
Disclosure makes comparability measurement more difficult.
Disclosure requirement constitutes seizure of private property without due process and in violation of proprietary rights protected by copyright laws.

Exhibit 1. The Debate About Testing Legislation in a Nutshell (cont.)

IV. Debate About Full Disclosure and Other Aspects of Legislation (cont.)

Counter Arguments About Full Disclosure

Students can learn abcut tests and test strategy from examining test questions.

Security need not be an issue; new measurement technology could enable testers to eliminate the problem.

Development costs would not increase as much as testers suggest.

Items now available only to expensive coaching schools would be available to everyone, benefiting poor students.

There are many solutions to the comparability problem; the laws do not adversely affect comparability measurement.

The fairness issue takes precedence over technical matters.

Disclosure will help admissions officers as well as students.

Arguments Against Release of All Studies, Evaluations or Statistical Reports Pertaining to a Test

(para. 341, New York; Sec. 4(a)(1)(A), Weiss Bill)

These provisions may interfere with academic and institutional freedom in violation of the First Amendment of the U.S. Constitution.

I. BACKGROUND

Roles of Schools

America's schools serve many functions. They play a major role in socializing our children, teaching them explicitly and implicitly what is expected of them as citizens. They serve as the locus for acculturation, integrating children from many different backgrounds. They offer a wide range of courses, services and experiences designed to encourage full personal development. They figure heavily in courtship and mate selection. They bind neighborhoods and communities. And they train children in the technical skills they will need to fit easily into the work world that lies beyond formal schooling. With this last function, the preparation of future workers, comes the schools' role in *certifying*, identifying for the world outside the school individuals who have certain marketable skills or are likely to make particular contributions to society. Certification often requires testing of some kind.

Certification

Testing

Roles Change

Public interest in the schools tends to focus on one or two of these functions at a time and groups of people tend to value some of the functions over others, depending on a variety of social factors. Consequently, there are many people for whom the paramount function of schools is to educate each individual child to his or her full potential, and there are many for whom the paramount function is simply to train children to work in the existing work world. The former might question the wisdom of a three R's curriculum, and the latter might question the utility of many elective courses. The former might dominate educational policy during a "progressive" era, and the latter might dominate during a "back to basics" era.

Schools and Social Concerns

America has seen many progressive and many basic eras, as well as eras that have been dominated by concern for the sorting, supervisory and acculturative functions. All of them seem tied to such noneducational matters as the nation's economic health, wars, large shifts in the kinds of work available in the society, large influences of immigrants, baby booms or civil rights movements.

> *. . . However laudable its intentions, the New York law cannot force test companies to explain the meaning of test scores to students: and certainly this law cannot deal with the complex issues of test validity and the role of cultural factors in influencing test results. The construction, evaluation and interpretation of tests are highly technical matters which must be dealt with by ongoing research by those who are trained in this specialty. The important problem of the use and abuse of standardized tests cannot be resolved by a simplistic law which confuses this issue with consumer protection problems.*
>
> Kenneth B. Clark, Social Psychologist
> Member, New York Board of Regents,
> *The New York Times*, August 18, 1979

Accountability a Current Social Theme

Our present post-Vietnam and Watergate era is marked by a widespread reappraisal of American institutions. There is disillusionment with the American military, the federal government, the Presidency, the FBI, the CIA, the oil companies, the press, the courts, nuclear energy — the list goes on and on. And in all of the criticisms of our institutions, one is persistent enough to roughly sum up the era's theme: our institutions are accused of not being sufficiently accountable to the people who support them and whose lives are affected, sometimes profoundly, by their actions. Our educational system has not escaped this desire to demystify institutions and regain control over them. It, too, is being asked to account for its ways. Although the pressure for accountability has touched all of the many functions of our schools, it has (perhaps because of the state of the economy) focused mainly on the training/certifying functions. The schools are suspected of not producing a work force sufficiently competent to meet our complex social and technological needs. The burden of proof that they are or are not has shifted back and forth, but the proof itself has depended heavily on standardized test scores. With more weight being placed on standardized test scores as indicators of educational quality, it was only natural that the tests themselves would come under increasing scrutiny. Charges of misuse, bias against minority groups and cavalier treatment of test subjects have proliferated as test use has proliferated. Add the fact that testing is an enterprise of sufficient magnitude to fall prey to the national skepticism; add the fact that tests have become an integral part of the infrastructure upon which the ideal of an American meritocracy rests; and add the fact that the ideal of a meritocracy itself is under attack — and it is not surprising either that this issue has surfaced again or that it generates vigorous and confusing debate.

Are Schools Accountable?

Proliferation of Test Use

Testing and Education Both Under Fire

This is not the first time the testing community has been examined, of course. There is an extensive critical literature about testing that goes back a half century. Many of the antagonists at the recent legislative hearings on this issue have crossed swords for decades. Banesh Hoffman's *The Tyranny of Testing*, a classic critique of the industry, was published in 1962; the Russell Sage Foundation studies of tests and their implications were conducted in the mid-sixties; and the Commission on Tests, convened by the College Entrance Examination Board to study its activities, published its findings in the early seventies. Many other studies have been conducted during this decade,* and the National Academy of Science is currently investigating the issue. However, this is the first time a law such as New York's Admission Testing Law has actually been enacted, and as the issue surfaces this time, it finds itself in the age of sunshine laws and consumer protection legislation. It is an old issue in a new context.

Conflicting Views of Testing

A brief report such as this one could never do justice to the interesting history of testing in America or to the complex role that it has come to play in our lives. However, a short survey of conflicting views about testing is necessary because they undergird arguments for and against testing legislation. Many people support or dislike the legislation solely on the strength of their feelings about test companies and irrespective of any facts that might be introduced on one side or the other.

A. DEBATE ABOUT TESTING COMPANIES AND THEIR INFLUENCE

Criticisms: Testing Agencies Too Powerful

Critics of American testing agencies assert that they have enormous collective power and influence. They claim that over 40 million elementary and

*See VII: Bibliography, page 54.

secondary students take more than 200 million tests every year at a cost of more than a quarter of a billion dollars. Entrance into higher education and a multitude of occupations depends heavily, the critics maintain, upon standardized test scores. In spite of their critical role in determining who gets ahead in America, many of the agencies are accountable to virtually no one. They appear to their critics to create their own lucrative markets and operate largely in secret, ignoring criticism and cultivating a coterie of psychometricians and researchers who both sanction and further mystify their activities.

No Accountability

> *We allocate scarce education and work opportunities with aptitude tests. Few people understand these tests. Test developers and users do not provide information needed for us to understand. Yet we do not hold this industry accountable for their secretive probing of our minds. Current testing practices are harmful to this country's goals of equity and a competent work force.*
>
> Paul Pottinger, Director,
> National Center for the
> Study of Professions

Replies to Criticisms:

Agencies Have Minor Influence

Testing agency supporters agree that testing is important but argue that our education system is so complex and variegated that testing's influence is really relatively minor. Compared to the amount of time students spend doing other things, their involvement with standardized tests is almost negligible; and compared to the billions of dollars spent upon education, the millions spent on testing do not amount to very much. Like any other companies, the testing companies are subject in various ways to the regulation of the market, their supporters argue. Test publishing is a competitive business in which failure to be accountable to customers can spell economic failure.

Accountability Exists

Professional Scrutiny

Legal Responsibilities

The major admissions tests are developed and administered under policies determined by associations of school and college people, independent client groups and trustees. Testing is further regulated by professional standards, such as those published by the American Psychological Association. Tests are widely reviewed in journals and in Oscar Buro's *Mental Measurements Yearbook*. Were there valid professional criticism of particular tests, they could not survive. Companies are also subject to court decisions, since any test can be legally challenged and many have been. Far from being secret, the companies see themselves as remarkably open, for competitive businesses. They publish numerous reports about their tests, they sponsor considerable psychometric research, they make past tests available, and they make every effort to tell test takers and users about the limitations of standardized tests. Test agency supporters believe that critics have confused test security — a technical issue — with secrecy. They agree that they are intent upon keeping tests secure, but they do not believe they are secretive.

Power of Test Companies a Relative Matter

One who examines the arguments about test company power and lack of accountability will find the truth of the matter elusive. Power, amount of regulation and secrecy are all relative. Individually and collectively, test companies clearly have power, but is it "too much" power? Clearly they are subject to some market, court and professional accountability, but is that enough control over their activities? Clearly they are neither entirely open nor entirely secret. There is too much room for interpretation of such matters. Commitment to one position or the other must ultimately rest upon beliefs or attitudes that structure the "facts" to support a particular point of view.

Among those things, beliefs about the power, secrecy and accountability of test companies will depend upon beliefs about whether massive use of standardized tests has had a positive or a negative effect upon American education.

More Criticisms: Tests Do More Harm Than Good

Take Too Much Time

Many proponents of testing legislation believe that, on the whole, widespread use of standardized tests for admissions and general educational evaluation has done more harm to education than good. They argue that too much time that might otherwise be spent learning is spent preparing for, administering, taking and worrying about standardized tests. Too general to apply to any particular curriculum, the tests either deter teachers and students from their normal path or force them to alter their curriculum to match inappropriate test goals.

Tests are Biased

Critics of massive testing also argue that it is incompatible with a pluralistic society. Nationally normed tests designed to be used anywhere are likely to be somewhat irrelevant to the lives and concerns of various groups. Cultural bias of one kind or another — middle class, urban, English speaking, whatever — cannot be eliminated. Consequently, critics charge, many people are judged by standards they do not hold and many are tagged as "underachievers," with unfavorable consequences for their lives. Outside the world represented by standardized tests, they remain outside the educational escalator that leads others to college and the good life.

Social Overreliance on Tests

In further support of their belief that the consequences of massive testing are more negative than positive, some critics argue that the present overreliance on these intellectual measures may well lead to worse social stratification than we had before they came into widespread use. Ability grouping on the basis of test scores tends to separate low performers from high performers. Not only does this practice unfairly stigmatize individuals, it impedes acculturation by keeping social classes separated. Some critics fear that an overreliance upon test scores for selection to college may lead to a uniform student population and a less diverse social talent pool than America needs for healthy social growth.

Tests Disguise Economic Determinants of Success

Finally, some critics of widespread testing point out that it fosters the cruel illusion that people get ahead in America by performing well on achievement and ability tests. There is considerable evidence that getting ahead in America has less to do with academic success than it does with motivation, personality and advantages or disadvantages conferred by the social class into which one is born. These critics argue that the "meritocracy" based upon testing serves only to mask the fact that our economic system creates inequities no amount of schooling can erase.

> *To believe that legislation requiring the dissemination of all manner of information about tests will in any way remediate basic societal ills, some of which have been scores of years in the making, is to engage in the most fanciful and wishful thinking.*
>
> Philip R. Rever and
> Richard L. Ferguson,
> American College Testing Program

Reply to Criticism: Standardized Tests Better Than Subjective Judgments

Arguments for the positive influence of testing upon education begin with the observation that this is, in fact, a competitive society and people will make judgments with or without standardized tests. The judgments they make without them, testing supporters argue, are likely to be "subjective," introducing the kinds of bias and discrimination that tests have largely eliminated. Even if imperfect, standardized tests are better than "subjective" measures.

Growth of Testing Due to Demand

Testing supporters point out that testing grew in response to public and institutional demands. Educators asked for it; it was not imposed upon them. The test companies have performed numerous services for the society at its request, enabling millions of people to compete fairly for scholarships, university admissions, promotions, jobs, high school or college credit and a host of other social rewards. Although it is true that some people miss out on these rewards, it is equally true that others reap successes they might not otherwise have had opportunities to achieve.

Tests Don't Affect Curriculum Adversely

Testing supporters do not believe that standardized tests play a major role in curriculum change. Although some teachers may, indeed, try to teach to some tests, they cannot teach to general ability tests such as the *SAT*. So many factors weigh in decisions about what to teach — state, district and building guidelines, textbooks, faculty pressures, and training, to name a few — that tests constitute only a minimal influence. In addition, test publishers always warn against overreliance upon the tests in the handbooks they send to users.

Tests Address Commonalities

Test Makers Work to Minimize Bias

There are three responses to the charge that standardized tests ignore America's pluralism. The first is to assert that although there are indeed differences among Americans there are also commonalities. Educational goals are remarkably similar from school to school, so it is possible to construct tests that touch everyone's experience without insisting that all people are identical. The second response is to acknowledge the difficulty of the task and the need for pluralism in test construction and review. The testing community believes it has been trying for many years to reduce chauvinism and cultural biases in its tests by involving people from all walks of life in the development of tests. The third response is to ask for empirical evidence of bias and present arguments that tests are not, in fact, biased. This is the approach taken recently by Arthur Jensen in *Bias in Mental Testing*. Since the problem of measurement bias and error is central to the psychometric discipline upon which testing rests, the testers argue that they could never ignore it, even if they wanted to.

Danger of Overreliance

Supporters of testing answer charges that overreliance upon testing can be socially destructive by agreeing that it is probably so. They note the dangers of overreliance upon anything, and spend much of their time explaining the limitations of tests to their consumers. If individuals or the society itself misunderstand and misuse tests to unfairly group children or weaken the social talent pool or whitewash deeper social problems, there is little the test companies can do about it. They have tried to inform the public but the public must be responsible if it does not listen. The question of misuse will be examined later, after the arguments about the quality of standardized tests have been considered.

B. DEBATE ABOUT THE QUALITY OF STANDARDIZED TESTS

Debate on Test Quality and Nature:

Beliefs about the impact of standardized testing companies upon education are inseparable from beliefs about the nature of standardized tests themselves. If there were a consensus about the nature and quality of the tests, the debate

No Consensus Apparent

about widespread use of them would be easier to resolve. But there is no such consensus and never has been, either outside or inside the testing community. Much of the criticism of test companies and the momentum for legislation stems from concern about the characteristics of standardized tests and the very assumptions upon which they rest. Even though testing legislation is aimed primarily at admissions tests — i.e., *aptitude* tests — the debaters constantly introduce information about *all* tests.

Theoretical/Practical Criticisms

Several theoretical and practical criticisms of standardized tests are relevant here because they have either been brought up in testimony or are implicit in the legislation. The theoretical criticisms include questions about the model of human behavior upon which modern testing rests and testing's status as a science. The practical criticisms include technical questions about the objectivity of tests, the procedures employed in validating them and the formal characteristics of tests. The following brief discussion of these issues will not do justice to their complexity and sophistication. It is intended only to further establish a relationship between the immediate issue of testing legislation and other deeper educational and social rifts.

> *Hispanic communities have long been victimized, we believe, above and beyond any other identifiable population, by certain kinds of tests, including the principal standardized assessment instruments such as the SAT, GRE, LSAT, MCAT and others, because of the well-recognized linguistic and cultural biases against Hispanic Americans that those tests have built into them. The testing services have not done enough to counter or control for these non-validating non-predictive distortions of the test scores when applied to Hispanic American populations, and we believe that the proposed H.R. 4949 as well as at least one additional feature in H.R. 3564 represent a first and long-needed step in improving the situation of our community.*
>
> Gary D. Keller,
> Hispanic Higher
> Education Coalition

Philosophical Clash

At the highest level of abstraction, the debate about testing is another manifestation of the as yet unresolved 17th century debate between rationalists and empiricists about the nature of the human mind. Some might even argue that the Platonists and Aristotelians are once again doing battle. One does not need to be a philosopher to know that there are many ways of looking at life and some of them always seem to be in conflict. In this case, the very fact that testing arose out of one perspective about human behavior guarantees that people with a different perspective will not accept some or all of its premises. It is safe to say that some of the antitesting emotion in the air is antibehaviorism or antiempiricism or antipositivism; it is a philosophical antagonism unlikely to be resolved by any amount of data.

Other Criticisms

IQ and Standardized Tests

Another contributor to the antitesting point of view is the historical and theoretical association of standardized tests with IQ tests, to which they bear a family resemblance. Critics believe that IQ test research is weak, that the developers of the tests made simplistic assumptions about human intelligence and that IQ scores have been widely misused. The images of IQ tests and the aptitude tests that resemble them are not helped by the absence of a scientific consensus about the nature of intelligence, ability or human learning. Critics of

tests point to this general theoretical weakness, and overreliance upon a very limited psychology as evidence that standardized tests rest upon a shaky foundation.

Tests Not That Objective

Since the machine-scored multiple-choice tests at issue in testing legislation are often called "objective" tests, in contrast to "subjective" measures, it is important to note that many critics of standardized tests do not consider them objective in any commonly understood sense. In fact, critics resent the fact that tests are described with such loaded words as "objective," "reliable" and "valid," charging that the public understands such words in one way, while testers are using them in another way. Any ability or achievement test is the result of numerous human judgments about the theory behind a test, the content parameters, what is important within those parameters, how many questions should be asked to establish knowledge of a concept or process, what the directions should say, what constitutes a good question, what constitutes a right or wrong answer and dozens of other things. The only aspect of a test that might be termed objective is the scoring, which is done by a machine instead of a human being. But machines are not really objective; they simply count blackened ovals, a very specialized sort of task they will carry out however absurd the test they are scoring. Critics of the tests argue that it is misleading to imply that without these "objective" tests we are left with the opposite, "subjectivity." In fact, the opposition should only be between "machine-scored" and "human-scored," a very different matter. Nor should the word "subjective" be used disparagingly, since grade point average, an accumulation of subjective judgments, is superior to test scores as a predictor of success in college and since subjective judgments form the basis for our legal and political systems, not to mention a host of other essential human activities. The framing of the debate in simplistic "objective"/"subjective" terms is disingenuous and unfair to both sides.

> *If proposed legislation is passed, it would certainly destroy the important elements and direction the New Medical College Admissions Test has taken, it would undermine the confidence the Admissions Committee members place in it as a tool for admission, and it would certainly make the admissions process more subjective. Furthermore, this requirement could potentially lead to the development of local tests which would increase the burden on candidates with limited resources and there would be no assurance of the same standard quality.*
>
> D.K. Clawson, Dean,
> College of Medicine,
> University of Kentucky

Faulty Test Questions

Because the creation of aptitude and achievement tests involves a great many human judgments, it is not surprising to discover that virtually any test will contain items with which someone can find fault. Critics of the tests delight in ridiculing the inept, absurd or wrong-headed items that sometimes turn up. How scientific can the process be, they ask, if — in spite of numerous review committees and diligent quality control — the tests still regularly include these "ringers"? This question evokes a common technical criticism of machine-scored, multiple-choice tests: namely, that they have too little "validity," even according to the standards developed by the psychometric community itself. The *Standards for Educational and Psychological Tests*, published by the American Psychological Association and often mentioned both in legislation and in testimony, require at least one of three types of validation for every

Validation Requirements

commercially published test, depending on its intended use: (1) predictive validation (is there evidence that predictions made on the basis of the test score will hold up, according to other measures of aptitude or achievement?); (2) content validation (how thoroughly does the test sample the class of situations or subject matter about which conclusions are to be drawn?); or (3) construct validation (what theories will account for performance on the test and explain the meaning of high or low performance?). If a test has been designed to predict success in college, the test developer should conduct studies that establish clearly the extent to which it does so and with what margin of error. If a test is designed to permit generalizations about one's level of reading comprehension, the test developer should produce some definition of comprehension, evidence that the items address the concept and evidence that students who do poorly on the test cannot comprehend reading materials.

Inadequate Validity Studies

Although all test publishers conduct validity studies, critics of the tests charge that the studies are either poorly done or done with such a narrow focus that validity has not been assessed for the majority of uses to which a test will be put in the real world. For instance, an aptitude test may well predict first year success at a certain type of university but not predict success beyond the first year or at another type of school or for another curriculum or for a different population of candidates. Content validation is very difficult to establish. A subject area is so complex and the constraints for a given test so limiting (e.g., it must be short, it must be machine scorable, there must be right and wrong answers, etc.) that every test is severely reductive. No test can hope to address more than a fraction of the assessable content, yet that fraction must adequately represent the entire area. Building a chain of inferences from such a narrow field to conclusions about the test taker's grasp of an entire subject area or the test taker's general "aptitude" is not easy.

Questioning Validity Studies

In short, validity studies are difficult to do and almost impossible to do *to everyone's satisfaction.* Critics of a test can question its "face" validity (whether it appears to a reasonable person that the items measure what they purport to measure) without conducting any kind of study; they can question the predictive validity of the test in different situations; the comprehensiveness of the content and the relationship of items to the subject matter; and the entire theoretical framework upon which the test is based. The room for reasonable disagreement about each kind of validity allows for disputes of a magnitude that one rarely finds in the hard sciences. We should not be surprised, then to find critics faulting the test companies for not living up to their standards when those standards themselves are so difficult to achieve.

> *The legislation before this committee (principally Sections 3 and 5 of HR 4949 and to a certain degree section 6 of HR 3564) calls for all information to be a matter of public record rather than that which a test producer chooses to make available. Public accountability in the largest sense is what the legislation demands. Given the role that tests play in American life, such a demand is not unreasonable.*
>
> Vito Perrone,
> University of North Dakota

More Criticism:

Besides attacking the theory behind standardized tests, the subjectivity in their development, their validity and the means used to establish validity, critics also attack the very *form* of the test. Some point out that the medium of

standardized testing is also a message about life. The various messages students receive from standardized, multiple-choice tests, according to critics, include:

Multiple-Choice Tests Convey Negative Messages

1. We should always follow directions.
2. There are right and wrong answers to everything.
3. Guessing is bad.
4. Facts are important in and of themselves.
5. Attitudes, creativity, imagination and feelings are not important.
6. Intellectual ability is the most important of human attributes.
7. Fast work is better than slow work.
8. Blackening ovals is more educational than writing.

Real Thinking Discouraged

Some critics have argued that these formal characteristics discourage deep thinking or reasoning (some would say they *penalize* deep thinking), undermine the value of writing and encourage a passivity that renders real learning impossible. Educators who believe that the form of an evaluation should be compatible with the nature of the thing being evaluated (i.e., learning) find greatest fault with the tests on these grounds.

Misuse of Tests

A final important criticism of standardized tests is one voiced within the testing community as often as it is voiced outside: they are widely misused. Some teachers mistakenly teach to them, some teachers draw unwarranted conclusions about students' intelligence on the basis of test scores, and some schools use them to screen minorities out of college-bound classes. Some administrators use them to evaluate teachers, some administrators use them as the sole indicator of the school's quality, and some school boards and legislators draw unwarranted conclusions about schools on the basis of test scores. Finally, government programs use them for impact evaluation and allocation of funds, and media overestimate their importance and overdramatize them.

The test companies assert that they diligently warn users about the limitations of the tests and the caution with which interpretations of scores must be made. But the critics assert that in this respect they resemble the gun lobby, which steadfastly insists there is nothing wrong with guns *per se* — it is gun *users* we should worry about. The comparison of tests to guns is unfair, but the point is important: there is a national disposition, critics argue, to accord numbers and "things scientific" an unquestioned respect, if not a primitive sort of worship. With gullibility so universal, the test publishers' efforts to discourage misuse would be doomed, even if they tried as hard as they could. Critics contend, of course, that they are not trying as hard as they could. No one expects a competitive business to advertise its weaknesses; rather, we expect them to be proud of their products and stress their virtues. Although it is true that a part of any test publisher's time is spent warning people about tests, a much larger part is devoted to cultivating the sort of scientific image necessary to create confidence in the tests and increase sales. And it is for this reason that many people advocate testing legislation. They believe that the test companies are *by their very nature*, incapable of dealing with misuse, even though they may sincerely desire to do so.

Some Misuse Inevitable

Rebuttal of Criticisms:

What can one say when someone suggests that your theoretical base is weak, your tests can seldom fully meet even your own standards for validity, your instruments convey insidious messages about life, your product is too liable to be misused, and there is little you can do about any of it?

Different Frames of Reference

To begin with, you make the point we began this discussion with: There are different frames of reference involved and matters do not appear so grave if one sees them from within the perspective of the empirical tradition of psychometric

research and theory. Furthermore, many of the charges leveled against testing can be fairly leveled against the educational and social systems whose needs, prejudices and failures the tests simply mirror. The better the tests serve society's needs, the more vulnerable they are to attacks that should rightly be directed at that society.

> *The test messengers, like thermometers, are telling us that we have a worsening illness. Rather than seeking a cure for the disease, those for whom the test results are most threatening would ask you to restrict, and preferably destroy the use of thermometers. Like Persian kings, they would slay the messengers who bring them bad tidings.*
>
> Frank W. Erwin, American Society for Personnel Administration

Test Theory No Weaker Than Educational Theory

There have always been problems with the theory and application of IQ tests, but there have been problems with any number of things in young sciences like psychology and sociology, as well. No one will escape them. The important point is that professionals in the field are conscientious about testing their theories, conducting research and improving both the theoretical and factual base of their discipline. If one wants to argue that testing should cease until we have adequate theories about intelligence, ability or learning, one might as well argue to cease educating entirely, for education, too, lacks sufficient theory.

Testing Helps Fair and Accurate Evaluation

Testing's career is no more checkered than education's (or business' or politics'), supporters of the tests argue. There is probably not a single school age or older American who could not cite at least one instance of unfair treatment by a teacher or a school system. Testing supporters argue that the arbitrariness with which students are treated and grades are assigned is a scandal that has had worse impact upon individual lives than anything connected with standardized tests. Feeling that they have created a great many helpful instruments that have contributed to fairness and accuracy of evaluation, they resent being on the defensive. Testing, an effort to bring greater precision and objectivity to human judgments, needs no apology.

Defense of Testing Terms

Test makers do not see their use of the words objective, reliable, valid or subjective as deceptive. The precise meanings they give the words reliable and valid are spelled out in hundreds of publications; their use of objective both fits within a scientific definition (if the results are replicable by someone else, they are objective) and common parlance. They use subjective much like all of us do, they believe, to simply class judgments made by individuals.

Test Development Utilizes Broad Consensus

Test makers have never claimed that the test development process was objective. Rather, they stress the fact that the process of developing tests involves bringing many individual judgments together to create a consensus, thus lessening the potential effects of any individual misjudgment. They try to marshall the best judgments available about a test's subject matter; they use educators to design and review tests and items; they diligently field test their materials and scrutinize them for a variety of problems. They always hope that a test reflects the best professional opinion available, but they know that dissent is always possible. If a test reflects one professional point of view and other professionals with different points of view challenge its content or construct validity, the fault lies not with the test but with the profession. If professionals in the learning areas are divided, there will always be some who can question a test's validity; that is just something test makers must live with.

Critics Misunderstand Test Purposes

Testing supporters believe that much of the criticism aimed at standardized tests is based upon misunderstandings of the purposes for which most of the tests are designed. For instance, critics who charge that machine-scored achievement tests do not provide substantive diagnostic information are missing the essential point that most such tests (excluding explicitly diagnostic and certain criterion-referenced tests) are not designed primarily to provide that information. The tests are inappropriate subjects for classroom study because they are not designed for that either. Aptitude tests for admissions purposes are designed to discriminate among individuals in such a way that the people who perform best are most likely to succeed in their first year of college. A good item is one that will spread scores out, whether or not it is "relevant" to the students' curriculum or experience. The tests' major function is not to instruct or diagnose, not to encourage creativity, not to promote individualism, not to assess high-level cognitive skills, imagination, attitudes, compassion or sense of humor — teachers can do these things better than machine-scored tests. The standardized, norm-referenced test's major function is simply to rank-order the test takers. People who want to make sorting decisions about large groups of students — administrators, admissions officers, counselors — want this information. The test publishers believe that their tests carry out that limited, but important, function very well. They hope that other people take care of creativity, compassion and the other important human qualities that do not readily lend themselves to standardization and a machine-scorable format.

Major Function of Tests

Tests Do What They are Designed To Do

This point is worth stressing because it underscores an important difference in perception between the test makers and their critics. Test makers believe they are performing a particular educational service to a particular clientele and that they are doing this very well. They argue that, for making gross judgments about large groups of people, their tests *work*. Students who score 800 on the SAT will do well at Harvard and students who score 300 will not. The difference between students who score 550 and 575 is more problematic, so test makers believe people who make decisions should require more information, and individual test takers should have means of redress in the event that their scores are misused.

Competition Motivates Innovation

Test makers agree with their critics that validation — particularly construct validation — is difficult, and interpretation of correlations is a tricky business. But to say this is only to say that ideals are seldom achievable. As long as testing has critics and remains a competitive business, testing agencies will be motivated to improve their methodology. The best way to discourage improvements, they feel, would be to regulate testing in a way that removes any competitive advantage a new technique might bring. Some test supporters see the proposed legislation as just such a dampening influence upon their motivation to make better tests.

No Insidious Messages in Tests

As for criticisms of the implicit messages in standardized tests, the test makers do not agree that the messages are there. They feel that students are much more likely to receive insidious messages from the schools than from the tests, which only reflect other people's values. If our educational system itself teaches children to follow directions, believe every question has a right or wrong answer, believe guessing is bad, facts are important in themselves, fast work is better than slow and intellectual ability is the most important of human skills, then critics should put the blame where it belongs — on the system, not the tests.

Finally, as mentioned earlier, the test makers feel that charges of misuse are largely unsupported, but that they are as concerned about misuse of their tests when it does occur as anyone else. Although they believe legislative hearings

Legislation Will Not Correct Abuses

have helped educate the public about the limitations of tests, they most strongly disagree with those who say testing legislation is the only answer to the problem. Suggestions for nonlegislative improvements will be reviewed later in this report.

> *Students clearly want feedback on these exams which influence the course of career and life. The Congress should act to equalize currently available advantages in commercial "cram" courses by providing actual test responses and corrections directly to students. The public needs more data and better means of scrutinizing the test industry.*
>
> David Gastfriend,
> National Coordinator,
> Committee on Medical Evaluation,
> American Medical Student Association

C. PATTERNS IN THE DEBATE

Many Issues Raised are Irrelevant

The brief review of arguments about testing that have been raised in legislative hearings is unfair to the sophistication of many of them. But the review should serve to dramatize the fact that the debate includes many issues that do not directly pertain to the legislation. Before the legislation is reviewed in detail, it might be useful to separate immediate, relevant points from points that, however important in their own sphere, do not bear directly on the question at hand.

Observations: (1) Testimony Seldom Differentiates Among Tests

The first observation we can make is that much of the testimony for and against legislation lumps all tests together and either condemns or praises the lot. However, all the legislation except the Gibbons Bill (H.R. 3954) and the New Jersey bill addresses only tests given to substantial numbers of people seeking admission to higher education institutions. These are only a few of the hundreds of tests administered in America, and the population involved, though sizable, is only a fraction of all the students in our schools. Many arguments for legislation are based upon the characteristics, uses and effects of tests not at issue in any existing legislation. This is partly because it is difficult to draw clear lines between the ability tests in question, which assess general aptitudes developed over many years, and achievement tests, which focus more upon recently acquired knowledge but obviously test aptitude as well. It is partly because some people think about tests only in terms of selection or allocation and others think in terms of diagnosis or counseling. And it is partly because some people feel they must attack or defend *all* testing. But it might be more productive to limit debate to only those tests and students at issue. When one does that, the essential issues become easier to discern and alternative courses of action become clearer.

(2) Partisan Focus on Different Educational Aspects

(3) Different Needs for Information

A related observation about the debate is that each side tends to focus upon a different aspect of the education enterprise. Education is a complex hierarchy that begins with the individual student and his or her teacher and moves up to the classroom, the building, the state, the region and the federal government. There are different information needs at each level for different actors — principals, curriculum designers, superintendents, school boards, state education department personnel, federal program administrators or even federal court judges. Obviously, some people in some parts of the enterprise need kinds

of information that other people do not need at all. The individual teacher knows the most about the individual child; he or she does not need standardized tests to identify the good and the bad students. But school boards, taxpayers, state education department people or university admissions officers do not know what the teacher knows and need a quite different kind of information. Antitesting people tend to focus more upon the individual teacher and student and their information needs than upon people elsewhere in the system who have different or more abstract needs. Pro-testing people tend to see themselves as servants of those people in the enterprise who need somewhat abstract, relatively crude but useful information for administrative decisions. Antitesting people argue that tests are bad for education and pro-testing people argue that they are useful to education; neither means the same thing by the word "education." This failure to see American education as a multidimensional, hierarchical, sociopolitical enterprise dooms debates such as this one to eternal irresolution.

(4) Focus on Who Does Well and Who Does Not

Another difference in focus that causes the arguments to miss each other is a natural consequence of the fact that some people do well on tests and others do not. Many antitesting people tend to be more interested in those who do poorly, while many pro-testing people tend to focus more upon those who do well. One side talks about opportunities denied, the other about opportunities afforded by tests. For every example antitesters produce of someone overlooked because of low scores, pro-testers produce someone who would have been overlooked if it were not for his or her high score.

(5) Debate Over Functions of the Schools

This chapter began with the observation that schools serve many important functions; education is only one of them and certification is only one of many aspects of education. Many antitesting people value other school functions more than certification and find society's exaggerated concern for certification repugnant. Pro-testing people may also value other aspects of education, but find certification a compelling social need. The question of whether testing plays too great or too little a role in education cannot be answered without agreement about the importance of certification to the society at large. When one pushes the opponents in this debate to consider this larger question, one finds that they are likely to have quite different notions about how society ought to operate. Opinions about testing seem to be tied to opinions about inequality in American culture — where it comes from and how it can be best dealt with. Resolution again seems quite unlikely.

> *It is generally acknowledged that the disclosure would necessitate the development of more test questions and more test forms than are currently needed; it would be impossible to reuse questions that have been shown to be useful and valid. It would be unwise to legislate a change of this magnitude without adequate assurance that the quality of information gained from admissions tests will not thereby be compromised, without a clear indication of the number and identity of the students who might benefit from such changes, and without a comprehensive estimate of the associated costs.*
>
> Richard Berendzen,
> University Provost and President-Elect,
> The American University

This brief description of the background issues has emphasized the extent to which the arguments rest upon larger sets of values and different angles of

vision. *It would be unfair, however, to leave the reader with the impression* that the debate about the role and power of testing in America and the general quality of standardized, machine-scorable tests is irresolvable. Resolution is certainly possible for each individual. It only becomes difficult at the policy level because there are several competing public perceptions and interests at stake. Even at this level, however, there are ways of sorting through them to narrow the field of inquiry to one more congenial to decision making. Some of those strategies and avenues for further study will be discussed in Chapter VI.

II. THE LEGISLATION

Legislative Proponents' Assumptions

Proponents of the testing legislation assume that because so many people take admissions tests and because the tests critically influence lifelong opportunities, this is a matter of such overriding public interest that legislative action is appropriate. After all, they have argued, we have laws concerning "truth" in most other areas and there is ample precedent for regulating public utilities or industries that — like this one — are virtual public utilities.

Opponents' Reply

Before examining the legislation, however, it is important to note that representatives of the testing companies do not accept these premises. Testing legislation, they feel, should only be considered when a critical problem has been established and all other remedial measures have failed. They do not see that any such problem has been established by advocates of legislation, either prior to the New York law or in subsequent hearings on the federal bills. Pointing to some evidence that more than half of America's students apply to two-year schools that do not require standardized entrance examinations and that, of all students going into undergraduate higher education, 90 percent are admitted to their first choice institutions, they doubt whether there is a real need for legislation, especially at the federal level. Many people in the testing community agree with the spirit of the demands for more information for test takers, but feel that the agencies can meet them without legal coercion; laws, especially if hastily enacted, would probably do little to correct abuses and could conceivably do more long-term harm than good.

Major Legislative Characteristics:

The appendixes contain copies of the New York and California laws, as well as the Gibbons and Weiss bills. Tables 1-3, at the end of this chapter, summarize the major aspects of each, as well as bills that have appeared in other states. Following are some general observations about the bills and laws.

State Level

State-Level Legislation

Only California and New York have enacted laws. In other states, some proposed laws have died in committee, some have been defeated and some are still pending. It is difficult to keep current on these bills, so interested readers should contact state legislatures to get the most accurate information about their status.

State Enforcement Agencies

States usually propose to entrust enforcement to the agency responsible for postsecondary education. Suggested so far are the New York, Florida, New Jersey and Pennsylvania Departments of Education; the Colorado Commission on Higher Education; the Maryland Board for Higher Education; the Ohio Board of Regents; the Coordinating Board, Texas College and University System; and the California Postsecondary Education Commission. The fact that these state agencies are somewhat different in character and breadth of responsibilities suggests a potential for state to state miscommunication and confusion if more laws are enacted.

Most bills call for filing of all reports, studies or evaluations done in connection with the tests. There is disagreement about (a) who owns these reports (the test companies believe they are the property of individual institutions) and (b) whether this requirement infringes upon academic freedom to do research and

select candidates. See Chapter IV for more about this. Unlike any of the others, the New Jersey bill applies to virtually all standardized testing, including achievement tests and competency tests such as the Minimum Basic Skills Test and the New Jersey Collegiate Basic Skills Test.

Federal Level – H.R. 4949 ***(Weiss)***

Federal Legislation:

In the proposed legislation, the U.S. Commissioner of Education is charged not only with housing the statistical and financial data, but with "reporting" to Congress about such matters as the relation of test scores to background characteristics and the success of test preparation courses. Some critics of the bill see potential here for the establishment of an unnecessary bureaucracy and are concerned about the nature of this reporting.

The Weiss Bill

The Weiss bill requires test companies to tell test takers about the extent to which a test preparation course will improve their scores on particular tests. There is considerable controversy about (a) whether "cram courses" could ever be uniformly characterized in any way useful to serious researchers; (b) whether any such courses really improve scores; (c) whether, if any do, they do so for all tests or just some tests; (d) whether it would be worthwhile to enter into this area at all. The bill would also exclude all admissions tests given to fewer than 5,000 students per year.

H.R. 3564 ***(Gibbons)***

The Gibbons Bill

This proposed bill applies to *all* standardized tests — aptitude, achievement, occupational or whatever — written or oral. Thus, it goes far beyond any other proposed or enacted legislation, reaching into all levels of educational and employment testing, including civil service examination. Offsetting its ambitious range is the fact that it does not require anyone to file anything with a federal agency and it does not call for full disclosure. Consequently, it gets scant attention compared to the Weiss bill.

The bill requires test publishers to divulge the "cutoff" scores required for higher education institutions. Test companies find this quite beyond their responsibility, since they do not even recommend cutoff scores and have no control over people who use them.

Section 6C appears to rule out all norming, a curious provision given that some of its other requirements cannot be met without norming.

Table 1

STATE TESTING LEGISLATION, ENACTED

LAW	TESTS TO WHICH LEGISLATION SPECIFICALLY APPLIES	TESTS WHICH LEGISLATION SPECIFICALLY EXCLUDES	MUST DISCLOSE TO STATE AGENCY	MUST DISCLOSE TO TEST-TAKERS	NOTES, SPECIAL PROVISIONS	STATUS
New York (S 5200-A A 7668-A Cal. No. 1215)	Any standardized test used for postsecondary or professional school admissions selection	Civil service exams or tests used for any other purpose; Advanced Test of Graduate Record Examination; College Board Achievement Tests	Test agency must file with Commissioner: . Pertinent background reports . Pertinent reports, including explanation of score scale, standard error and available correlations between scores and grades, course work and parental education . Test questions and answers used for raw score . Rules for transferring raw scores to final score	Must send to test-taker upon request: Test questions and answers and answer sheet . Raw score Information test agency must provide test-taker at registration: . Purposes of test . Intended uses . Subject matter, knowledge and skills being measured . Explanation of score scale, standard error . Available correlations between test scores and grade . How scores will be reported . Who owns the scores; how they will be treated	Full disclosure law Agency must also make public any reports prepared for individual institutions Test items used for field trials or comparability over time may be withheld Scores cannot be sent to institutions without specific consent of test-taker	1-1-80, effective date

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LAW	TESTS TO WHICH LEGISLATION SPECIFICALLY APPLIES	TESTS WHICH LEGISLATION SPECIFICALLY EXCLUDES	MUST DISCLOSE TO STATE AGENCY	MUST DISCLOSE TO TEST-TAKERS	NOTES, SPECIAL PROVISIONS	STATUS
California (S.B. 2005)	Any standardized test used for postsecondary admissions selection given to more than 3000 students/year	Tests used for research, pre-test, guidance counseling, placement or meeting graduation requirements of secondary schools	Within 90 days of close of each testing year, test sponsor must file with Postsecondary Education Commission: . Test questions equivalent to those used on secure test, plus answers . Data about predictive validity of grades alone, score alone, grades and score together . Information conforming to APA guidelines Within 185 days after close of testing year, test sponsor must report for each test: . # of times test taken . # of individuals tested once, twice and more than twice . # registered but did not take . Total amount of fees received . Expenses incurred	Similar to New York except for full disclosure of items	Not full disclosure	1979, effective date

Table 2

STATE TESTING LEGISLATION, PROPOSED BUT NOT ENACTED

BILL	TESTS TO WHICH LEGISLATION SPECIFICALLY APPLIES	TESTS WHICH LEGISLATION SPECIFICALLY EXCLUDES	MUST DISCLOSE TO STATE AGENCY	MUST DISCLOSE TO TEST-TAKERS	NOTES, SPECIAL PROVISIONS	STATUS
Colorado	Any standardized test used for postsecondary admissions selection given to more than 3000 students/year	Tests used for research, pre-test, guidance counseling, placement or meeting graduation requirements of secondary schools	Provide Colo. Commission on Higher Education: Within 90 days of close of each testing year, test sponsor must file: . Test questions equivalent to those used on secure test, plus answers . Data about predictive validity of grades alone, score alone, grades and score together . Information conforming to APA guidelines Within 180 days after close of testing year, test sponsor must report for each test: . # of times test taken . # of individuals tested once, twice and more than twice . # registered but did not take . Total amount of fees received . Expenses incurred	Background and explanatory material	Not full disclosure	Did not pass

BILL	TESTS TO WHICH LEGISLATION SPECIFICALLY APPLIES	TESTS WHICH LEGISLATION SPECIFICALLY EXCLUDES	MUST DISCLOSE TO STATE AGENCY	MUST DISCLOSE TO TEST-TAKERS	NOTES, SPECIAL PROVISIONS	STATUS
Florida	Any standardized test used for postsecondary admissions, financial aid for placement	Civil service or job placement tests	Provide Dept. of Education background information: Within 90 days of close of each testing year, test sponsor must file: . Test questions equivalent to those used on secure test, plus answers . Data about predictive validity of grades alone, score alone, grades and score together . Information conforming to APA guidelines Within 180 days after close of testing year, test sponsor must report for each test: . # of times test taken . # of individuals tested once, twice and more than twice . # registered but did not take . Total amount of fees received	Must send to test-taker upon request: . Test questions and answers . Answer sheet . Raw score Information test agency must provide test-taker at registration: . Purposes of test . Intended uses . Subject matter, knowledge and skills being measured . Explanation of score scale, standard error . Correlations between test scores and grades . How scores will be reported . Who owns the scores; how they will be treated	Full disclosure	Did not pass

BILL	TESTS TO WHICH LEGISLATION SPECIFICALLY APPLIES	TESTS WHICH LEGISLATION SPECIFICALLY EXCLUDES	MUST DISCLOSE TO STATE AGENCY	MUST DISCLOSE TO TEST-TAKERS	NOTES, SPECIAL PROVISIONS	STATUS
			. Pertinent background reports, including any report made using test data . Pertinent statistical data, including explanation of score scale, standard error and correlations between scores and grades, course work and parental education . Test questions and answers used for raw score . Rules for transferring raw scores to final score Tests and answers filed with Dept. of Education within 30 days			
Maryland (H.B. 1425)	Any standardized test used for postsecondary admissions or placement	Civil service or job placement tests	Provide Maryland Board for Higher Ed. with: . Pertinent background reports, including any report made using test data . Pertinent statistical data, including explanation of score scale, standard error and correlations between scores and grades, course work and parental education.	Usual explanatory material, plus: . Whether cutoff scores will be used . Whether scores will be weighted greater or less than grades	Not full disclosure	Did not pass

BILL	TESTS TO WHICH LEGISLATION SPECIFICALLY APPLIES	TESTS WHICH LEGISLATION SPECIFICALLY EXCLUDES	MUST DISCLOSE TO STATE AGENCY	MUST DISCLOSE TO TEST-TAKERS	NOTES, SPECIAL PROVISIONS	STATUS
			. Test questions and answers used for raw score . Rules for transferring raw scores to final scores			
Ohio (H.B. 636)	Any standardized test for postsecondary admissions selection	Civil service or tests designed for placement or credit	Provide Ohio Board of Regents with pertinent background for tests, including correlations between scores and grades, ability to graduate, socioeconomic status, background characteristics, occupational performance. Provide test questions and answers.	Upon request, within 180 days, provide test subject's answer form, appropriate information for understanding score. Must send to test-taker upon request: . Test questions and answers . Answer sheet . Raw score Information test agency must provide test-taker at registration: . Purposes of test . Intended users . Subject matter, knowledge and skills being measured . Explanation of score scale, standard error . Correlations between test scores and grade . How scores will be reported . Who owns the scores; how they will be treated	Full disclosure	Did not pass

BILL	TESTS TO WHICH LEGISLATION SPECIFICALLY APPLIES	TESTS WHICH LEGISLATION SPECIFICALLY EXCLUDES	MUST DISCLOSE TO STATE AGENCY	MUST DISCLOSE TO TEST-TAKERS	NOTES, SPECIAL PROVISIONS	STATUS
Texas (H.B. 59)	Any examination used for determining admission to undergraduate, graduate or professional school		Provide Coordinating Board, Texas College & University System with pertinent background data on tests	Provide at registration brief description of exam, profile of scores on previous exams, list of services Provide everyone with test questions and answers whether they request them or not Upon written request, provide all information about a test-taker that is contained in testing service's records	Full disclosure	Did not pass
Pennsylvania (S.B. 994) (H.B. 2024)	Any examination used for determining admission to undergraduate, graduate or professional school	Civil service exams and other non-admissions tests. Advanced test of Graduate Records Examination and achievement tests excluded from disclosure	File with Department of Education: . Pertinent back-background reports, including any report made using test data . All test questions used to calculate raw score and answers . All rules for transferring raw raw scores to final score	Provide on request: . Copy of all questions used to calculate raw score . Answer sheet . Raw score Information test agency must provide test-taker at registration: . Purposes of test . Intended users . Subject matter, knowledge and skills being measured . Explanation of score scale, standard error	Full disclosure law. Agency must also make public any reports and data prepared for individual institutions Test items used for field trials or comparability over time may be withheld Scores cannot be sent to institutions without specific consent of test-taker	Pending

BILL	TESTS TO WHICH LEGISLATION SPECIFICALLY APPLIES	TESTS WHICH LEGISLATION SPECIFICALLY EXCLUDES	MUST DISCLOSE TO STATE AGENCY	MUST DISCLOSE TO TEST-TAKERS	NOTES, SPECIAL PROVISIONS	STATUS
				. Correlations between test scores and grade . How scores will be reported . Who owns the scores; how they will be treated		
New Jersey (S.B. 3461)	Any test developed by a test agency for the purpose of selection, placement, classification, graduation or any other bonafide reason concerning pupils in elementary and secondary, post-secondary or professional schools	Tests developed and administered by an individual school, school district or institution or employee thereof for its own purposes	Submit to Commissioner any studies, evaluations or statistical reports, pertaining to tests, including: . Correlations between test scores and grades, ability to graduate, SES, occupational performance Within 30 days after results of any standardized test are released, file with Commissioner: . Test questions used for raw score . Answers . Rules for transferring raw scores	At registration: . Purposes of test . Subject matter measured . Score scale . Standard errors . Correlations between test scores and grades . How scores will be reported and used After test filed with Commissioner, within 60 days of request, and without fee or charge: . Test questions used for raw score . Answer sheet . Raw Score	Full disclosure Includes elementary and secondary testing Prohibits charge for disclosure service Scores cannot be sent to institutions without consent of test-takers	Pending

Table 3

FEDERAL TESTING LEGISLATION, PROPOSED BUT NOT ENACTED

BILL	TESTS TO WHICH LEGISLATION SPECIFICALLY APPLIES	TESTS WHICH LEGISLATION SPECIFICALLY EXCLUDES	MUST DISCLOSE TO FEDERAL AGENCY	MUST DISCLOSE TO TEST-TAKERS	NOTES, SPECIAL PROVISIONS	STATUS
H.R. 3564 (Gibbons)	All tests used for postsecondary admissions selection All tests used for admission into any occupation All aptitude or achievement tests, whether written or oral	None	None	Provide usual background data describing test characteristics and uses Provide score, ranking, score required for admission to institutions of higher education	Not full disclosure No achievement test shall be graded on the basis of the relative distribution of scores of other test subjects (Sec. 6c)	Did not pass
H.R. 4949 (Weiss)	All standardized tests used for determining admission and placement in postsecondary education All tests used for preliminary preparation for any above test	Occupational tests Tests designed solely for nonadmission placement or credit-by-examination	Provide U.S. Commissioner of Education: . Any study, evaluation or statistical report which a test agency prepares or causes to be prepared . All test questions and answers* . All rules for transferring raw scores into final scores* Provide Commissioner, within 120 days of the close of testing year: . # of times test taken	Provide test-taker upon request: . Test questions and answers . Answer sheet . Raw score In addition: . Average score by income group . Extent to which test preparation courses improve test subjects' scores . Average score by income groups	Full disclosure Commissioner of Education shall report to Congress relationship between test scores and income, race, sex, ethnic and handicapped status. Also report on success of test preparation courses	Being redrafted

TESTS TO WHICH LEGISLATION SPECIFICALLY APPLIES	TESTS WHICH LEGISLATION SPECIFICALLY EXCLUDES	MUST DISCLOSE TO FEDERAL AGENCY	MUST DISCLOSE TO TEST-TAKERS	NOTES, SPECIAL PROVISIONS	STATUS
		. # of subjects taking it once, twice, more than twice . Refunds given . # of subjects for whom total fee waived or reduced . Total fees received, each test . Total revenue, each program . Expenses to test agency Provide Commissioner with information about admissions data assembly or score reporting services: . # people registering . Total revenue received . Expenses to test agency	. Extent to which test preparation courses improve test subjects' scores Information test agency. Must provide test-taker at registration: . Purpose of test . Intended uses . Subject matter, knowledge and skills being measured . Explanation of score scale, standard error . Correlations between test scores and grades . How scores will be reported . Who owns the scores; how they will be treated Upon request, provide test questions used to determine raw scores, answer sheet, raw score* * Tests administered to fewer than 5000 subjects/year exempted		

III. THE FULL DISCLOSURE ISSUE

Full Disclosure Furore:

Of all the provisions in the current and pending legislation, none has received more publicity than full disclosure. That provision requires test companies to return to test takers, upon request and within a certain number of days of release of scores, the test questions used in calculating their score, their answer sheet, their raw score and the formula by which their raw score was transformed to a normed score. This is the "truth" that truth in testing advocates want told. This is the heart of the strongest argument for legislation: that *as a matter of simple fairness*, students deserve to see how they did on the test and how their performance was turned into a score. The public, as well, deserves to know the contents of these instruments of public policy. Advocates of the fairness position do not argue that students will necessarily learn much about "aptitude" by studying their tests, though they might learn about test taking skills and strategies; nor do they believe that students will uncover gross unfairness or incompetency in scoring, though they might uncover a few mistakes that would have gone unnoticed. They argue primarily that a common sense, man-in-the-street notion of justice suggests that in a free society people should know exactly how they have been evaluated and judged. Nothing less should be tolerated.

The Pro's View— Fairness

The Anti's Answer — Tests Are Fair

An argument framed in terms of truth, fairness, justice (and we might as well add "the American way") is hard to meet head on. Who would urge falsehood, inequity and injustice? Consequently, no one has protested the value of the goals expressed by the advocates of the legislation. Everyone who testifies begins by endorsing them. However, the opponents of legislation then shift the argument away from the goals to problems involved in reaching them. Here, at the center of the debate, the opponents engage one another least of all: one side argues from values, the other counters with technical and financial data that cannot but sound petty by comparison. And both sides invoke the principle of fairness.

Disagreements About Full Disclosure

In *The Debate Over Open Versus Secure Testing: A Critical Review* (Strenio, 1979), Andrew Strenio Jr. has admirably detailed the disclosure issue. Readers are referred to that report for a more thorough analysis than we can enter into here. What follows is a synopsis of points made against full disclosure during legislative hearings, points raised by Strenio, and changes in the argument since Strenio's paper appeared. The points fall into four classes: (1) disagreement about the need for and utility of disclosure, (2) warnings about potential unintended consequences of disclosures, (3) technical considerations and their impact upon students, and (4) questions about the legality of the provision. The first three will be considered in turn in this chapter. The legal questions are reviewed in Chapter IV.

A. The Need For and Utility of Full Disclosure

A. Need For and Use of Disclosure:

Testers: Ample Information Provided

Opponents of full disclosure believe, first of all, that the test publishers are already providing students and users with ample information about the test, its properties and appropriate ages. It is a mistake, they believe, to think that real test questions are significantly different from the sample questions provided to students in their pretest materials. The sample test for the SAT is a real test given in the past; thus, the sample items and the items students will see on their

tests share the same properties, and anything that can be learned about test writers' minds can be learned from the sample items.

Students Don't Learn From Tests

Test makers have long argued that the aptitude tests used for admissions selection measure cognitive skills developed over a long period of time. They cannot be "studied for" in the way one might prepare for an achievement test. Consequently, they do not think students can learn much about their aptitude by studying the test questions they missed.

Pro's Response — Why Not?

The Answer

In response to this point, some advocates of disclosure ask how good can a test be if one cannot learn anything from it? The riposte is technical and utilitarian: a test can be good if it predicts what it is supposed to, regardless of whether one can learn much from it. And anyway, test makers argue, even if there *were* some marginal value in studying an aptitude test, it is heavily offset by the breach in security (discussed below under technical considerations).

Suggestions for Partial Disclosure

In an effort to find some middle ground, various parties have suggested plans for *partial* disclosure. For instance, the test companies could announce that one or two forms of a test will be disclosed each year, but the rest will remain secure. Or, every test could have a specified lifetime, after which it would be made public. Or, tests given on certain pre-announced administration dates would be disclosed, but others would not; students interested in disclosure could elect to take the tests on those dates and students who are not interested in disclosure could take the test another time. Another suggestion is that a test could consist of two equivalent halves, one of which was disclosed immediately and the other of which was disclosed after a year. These plans might conceivably be workable for some tests but not others, given the variety in affected tests, test schedules and reporting times.

Need to Get Most Use Out of Test Versus Need for Timeliness

Many testing people would be happy to disclose tests if they could get a certain amount of use out of them first, to make them efficient. What hurts, they argue, is not so much disclosure *per se*, but disclosure *after only one administration* of a test that has been years in the making. Supporters of legislation can be sympathetic to this point of view, but they feel timeliness is critical to disclosure if students are to have the opportunity to challenge their scores or take the test again. So the issue of partial disclosure hinges, in part, on the feasibility of compromising the students' interest in getting quick turnaround with the test companies' interest in getting maximum mileage out of a given test. No one has yet found a way to make that compromise but it is probably not impossible for some tests.

B. Potential Unintended Consequences of Disclosure

Potential Dangers of Disclosure

Teaching to the Test

Pro's Response

Critics of disclosure have warned that the existence of a large number of test items would present some danger of teachers teaching to the tests (especially achievement tests) rather than teaching what they are supposed to. If such practice became widespread, the curriculum might suffer. Proponents of disclosure counter this point by arguing that the legislation is intended to prevent such abuses by making available more information about the limitations of the tests.

Boon to Test Coaching Schools — Yes or No?

A related worry is that widespread availability of test items will be a boon to expensive test coaching schools. Already a resource beyond the reach of poor students, these schools will confer an even greater advantage to the affluent. Supporters of disclosure claim the opposite potential effect: that item availability will benefit the poor students by giving them materials once only available in coaching schools.

Increased Costs?

To the extent that disclosure will require test companies to prepare more new tests than they now do, and to the extent that the increased costs of this development will be passed on to students, costs of the tests will almost certainly rise, test publishers argue. Increased costs will discriminate against the poor students. Advocates of disclosure dispute both the amount of new material that would be required and the costs that must be passed on, but they are handicapped by a lack of hard data on these matters. Estimates of the amount of new material already in each test edition range from 10 percent to 80 percent; estimates of additional cost have ranged from $.32 per student on the SAT test to $25 per student on the MCAT test. Much depends upon the number of students available to share the cost burden. Obviously, tests given to smaller numbers of students — mostly professional school tests — will not generate the economies of scale that the SAT can generate, prompting some critics of testing to complain that disclosure will only, ironically, make the rich testing companies richer! As of this writing, the cost of the SAT has been raised from $8.25 to $10. In addition, students who request their answer sheets, test questions and correct answers will be charged $4.65.

Pro's — Costs Needn't Rise Much

Viewed from an ethical perspective, the actual cost is not a sufficient objection. In part because they have come to this realization, opponents of disclosure have deemphasized the cost argument in recent months. Whereas in the New York debate it was a primary objection, it is now considered a troublesome but solvable secondary problem.

C. Technical Consequences and Their Long-Range Impact

Technical Consequences and Impact

Testers Argue Lower Validity and Use If Security is Breached

Opponents of disclosure have argued that it would breach the security of the tests, thereby diminishing their quality and utility. Security is necessary, they argue, in order to ensure that some students do not have unfair advantage over others; to equate tests over time; to maximize the lifespan of time-tested, unbiased items; to meet students' and institutions' demands for flexible administration schedules; and to keep development costs as low as possible.

The points are connected, opponents of disclosure argue. For instance, if some students know what is on the test, the test is no longer a valid indicator of ability. The only way to make sure that does not happen is to give a new test every time. If one does that, the new tests are likely to suffer from hasty development or else use items from old tests. In either case, they will be lower in quality and less valid. If they are lower in quality or less valid or administered to larger groups, difficulties will arise making one test comparable to another, further eroding validity. Some tests are equated by using all or most of the items in the test. Although the laws allow for equating procedures that employ only a few items, they do not allow for this 'spiralling' approach to comparability (employed by the GRE Aptitude Test, for instance). The result of poorly equated tests, test makers argue, would be decreasing confidence in the tests by admissions officers. At its most extreme, this loss of confidence could hurt students who would be overlooked for admissions were it not for their high scores on tests.

Pro's Argue Security Not Vital to Validity

Alternatives to Security

Proponents of disclosure argue that there are two ways of insuring the benefits of security. One is to do what the testers have so far done, but the other is to do just the opposite: create a pool of items so huge that no one could hope to study for more than a fraction of them. Although it might take years to accomplish, every test would eventually consist of items drawn from the pool in a way that assured equivalence from test to test. If, in addition, each test consisted of some items that cannot be memorized — essay questions, for

instance, or various kinds of branching items — the validity need not suffer. Instead, face validity could well improve. Some proponents of open testing think that traditional security is a dinosaur anyway. Pointing to current trends in individualized instruction, diagnostic testing, tailored testing, criterion and objectives referenced testing, creativity and problem solving tests and developments in latent-trait theory, they see a future in which the traditional paper-and-pencil tests are used less and less. Futurists among them even suggest that cheap, widely available information handling technology will soon drive out the old modes of testing altogether.

Opponents of disclosure are not so sanguine about these largely untested suggestions, because they know too well the complex problems encountered in validating any system, secure or open. Nor have they been given years to create a new foundation for test validation. Nevertheless, most testers no longer take the hard line on the technical security issues that they took during the New York hearings. Individuals in the testing community are letting it be known that they now find the validity problem "challenging" instead of "impossible."

Medical Colleges File Injunction

One exception to this, however, is the Association of American Medical Colleges (AAMC), which has obtained a temporary injunction against the New York law until the case can be argued that, among other things (see Chapter IV), the disclosure provision would cause them "irreparable injury." They argue that disclosure of the Medical College Admissions Test (MCAT) forms, questions and related studies will destroy their value, because (1) the AAMC will no longer be able to assure examinees that they will have uniform access to the test questions; (2) disclosure of stimulus materials (passages, graphs, tables, etc.) will destroy other, as yet unused, questions that could be asked about the stimulus; (3) continued disclosure will exhaust the number of acceptable questions that can be generated for the science subtests (which are strictly limited in subject matter, by design); (4) disclosure will irreparably harm comparability studies that equate each test to previous tests; (5) disclosure will reveal the placement of nonscored, experimental questions, leading some examinees to ignore them; (6) release of MCAT results is more or less continuous; (7) disclosure of MCAT-related studies will reveal potential and actual test questions; and (8) disclosure of studies peculiar to individual institutions will force AAMC to breach its promises of confidentiality to those institutions.

Worry Remains About Test Development

Maximizing the lifetime of good items remains a nagging concern. Everyone who has developed a test knows how difficult and time consuming it is to create items that do what they are supposed to do and are relatively unbiased at the same time. Some representatives of minority groups testified against disclosure on these grounds alone. They were afraid that a proliferation of test items would increase the probability that culturally biased items would appear more often, offsetting steady progress toward minimizing them over the last 10 years. Prodisclosure people agree that this could be a problem, but they do not think it is beyond solution.

Less Flexible Administrative Schedule Results

The security issue does affect the number of times tests will be administered. There is currently considerable flexibility in administration dates, make-up dates, and provision for Sabbath observers and handicapped students. This flexibility is due largely to the fact that tests are secure. Test companies argue that — at least for the immediate future — the loss of security will require fewer administrations of the tests. That this cutback will indeed adversely affect individuals or the quality of the administrations remains to be seen.

Most recently, testing spokesmen have suggested that, although they might be

Long-Range Impact of Disclosure?

able to deal with the immediate problems of disclosure, they are uncertain about the consequences of many, many disclosures accumulating over a long period of time. Presumably, this concern is related to their concern that admissions officers will lose confidence in the tests as predictors of success in higher education. Any such loss of confidence is likely not only to further reduce the test's predictive validity but also to work against already disadvantaged students. Far too often, they fear, a student from an unknown school or with a mediocre academic background will be turned down because the admissions officer did not trust his or her test score.

IV. LEGAL IMPLICATIONS OF OPEN-TESTING LEGISLATION*

Open-Testing Legislation: Legal or Illegal?

As various "open-testing" bills are introduced and debated at the federal and state levels, legislators are increasingly cautioned about the potential illegality of these bills.

Federal Level

At the federal level, Congress is told that federal open-testing legislation would violate various provisions of constitutional and statutory law. The Tenth Amendment of the U.S. Constitution is cited because it reserves undelegated powers to the states, and education traditionally has been primarily a state responsibility. The First Amendment is cited because it arguably protects both the right of colleges to determine who shall be taught and the right of researchers not to disclose the results of their research regarding tests. The due process clauses of the Fifth and Fourteenth Amendments are cited because they prohibit depriving any person of property (tests) without due process of law. The Federal Copyright Act is cited because it arguably protects proprietary rights in the tests. The protection arguably granted these tests by the Freedom of Information Act (exemptions) is also cited.

State Level

Similar arguments are advanced in state legislatures. In New York, which has passed the strongest open-testing legislation as of this writing, the arguments are also being advanced in the courts. The Association of American Medical Colleges (AAMC) has challenged the New York legislation in federal court, relying primarily upon the due process and copyright arguments.[1] Another legal challenge has been filed by the College Entrance Examination Board (CEEB) against administrative interpretations of the New York law that affect tests that have been taken outside but used inside New York State.[2]

It is not possible in this chapter to discuss even in summary form all of the legal issues raised by these various claims.[3] Each legal claim needs to be considered in relation to the exact open-testing law involved and analogous case law, and these in turn need to be applied to the specific factual situation raised by the claim. For example, the particular open-testing law (the scope of regulation, the degree of control, etc.), the particular test (low volume, high volume, etc.), the particular use of the test (college admission, professional certification, high school diploma, etc.), the status of the claimant (private profit-making company, private nonprofit company, educational institution, etc.), and the harm asserted by the claimant (economic, educational, etc.) could all influence the outcome of a given case.

It will probably take years for the courts to resolve all of these issues, especially given the inevitable questions involved in interpreting and applying the exact language of any new law to specific factual situations. But it is possible and may be helpful to discuss in broad outline some of the more basic constitutional and statutory claims, and these will be considered under the following headings: (1) Legal Background, (2) Tenth Amendment, (3) First Amendment, (4) Due Process, (5) Copyright Act, (6) Extraterritorial Issues, (7) Freedom of Information, (8) Other Implications and (9) Conclusion.

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*This chapter was prepared by Merle Steven McClung, director of the Education Commission of the States' Law and Education Center. The footnotes appear at the end of the chapter.

1. Legal Background

Legal Background

In considering open-testing or any proposed legislation, Congress and state legislators must of course legislate within the parameters of the U.S. Constitution, as interpreted by the U.S. Supreme Court. In addition, legislation passed by state legislatures must be consistent with federal statutory law and their own state constitutions. Therefore legislators, with the assistance of their legal counsel, should make some assessment of the validity of the above legal arguments before passing open-testing legislation. The following discussion can help in making this assessment but additional analysis will be necessary for reasons mentioned above.

The constitutional issues and some statutory claims will be evaluated by courts in part by balancing the state (federal) interest in regulating tests with the claimant's interests. The state's primary argument will probably be based upon the public interest in providing information about the instruments used in making important educational and occupational sorting decisions about its citizens.[4] Proponents of open-testing legislation would probably also point to analogous precedent for regulation requiring disclosure of information such as the Securities and Exchange Act and various acts regulating the food and drug industries.

Opponents of open-testing legislation, on the other hand, will probably argue that test security is essential to test validity, and that disclosure will hurt more students than it helps. Testing companies will also allege infringement of proprietary rights in their tests. These and other arguments for and against open-testing legislation are set forth elsewhere in this report.

Since open-testing legislation is a new phenomenon, there is no case law directly balancing the equities and setting the legal parameters of such legislation. Related issues have been considered in a case where the U.S. Supreme Court balanced the equities arising under the National Labor Relations Act. In *Detroit Edison Company v. National Labor Relations Board*,[5] the Supreme Court overturned an NLRB order requiring Detroit Edison Company to disclose test questions and answer sheets that were used in an aptitude testing program under which some union employees had been rejected for certain job openings.

The Supreme Court's decision in *Detroit Edison* has been cited by some opponents of open-testing legislation as a legal bar to such legislation. This is certainly a misreading of the case since any court would find many important distinctions between the *Detroit Edison* case and open-testing legislation. Among these distinctions are the facts that *Detroit Edison* involved specific provisions of the National Labor Relations Act, aptitude tests used for employment purposes, and disclosure that infringed upon the privacy interests of the test takers. Any or all of these facts could be used to distinguish the *Detroit Edison* case from the kind of open-testing legislation considered in this report. In sum, the *Detroit Edison* case does not present a legal bar to open-testing legislation.

The Court's decision in *Detroit Edison* nevertheless may be of some interest to legislators since the Court was involved in balancing the conflicting legitimate interests of the union, individual employees, the employer and the test companies. Writing for the majority, Justice Stewart noted: "Test secrecy is concededly critical to the validity of any such program and confidentiality of scores is undeniably important to the examinees."[6]

The equities and ultimate balance reached by the Court might have shifted in this case if the examinees had requested rather than refused disclosure of the test questions and corrected answer sheets. The Court's conclusion that test security was critical to the validity of this employee testing program provides some support for those arguing that test security is essential to the validity of other kinds of testing programs, but this support is limited because "[t]hroughout this proceeding, the reasonableness of the Company's concern for test secrecy has been essentially conceded."[7] As noted elsewhere in this report, proponents of open-testing do not concede that test security is essential to test validity. The question of whether or not test security is essential to test validity is one of the key factual issues that legislators, and perhaps ultimately the courts, will have to resolve in considering open-testing legislation.

2. The Tenth Amendment

10th Amendment

The Tenth Amendment to the U.S. Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Since education is not specifically mentioned in the Constitution, education has traditionally been seen as primarily a state responsibility.

The Tenth Amendment, however, has never been interpreted to give the states exclusive control over education. Congress has passed many laws affecting education, with laws designed to protect the civil rights of students being a primary concern. Title VI of the Civil Rights Act of 1964 (racial discrimination), Title IX of the Education Amendments of 1972 (sex discrimination), Section 504 of the Rehabilitation Act of 1973 (handicapped discrimination), and the Family Educational Rights and Privacy Act of 1974 (student records) are obvious examples. Since testing involves the sorting of students and other citizens for various educational and occupational opportunities, with special implications for minorities and other protected groups, the federal government could claim a similar legal interest in open-testing legislation.

In sum, open-testing legislation would not appear sufficiently different from other federal legislation affecting education to raise serious questions under the Tenth Amendment. Since the argument based on the Tenth Amendment raises questions about the authority of the *federal* government over educational matters, it obviously raises no legal questions for *state* open-testing legislation.

3. The First Amendment

1st Amendment

Another constitutional claim is that open-testing legislation infringes on First Amendment liberties in two ways: first, the legislation infringes upon a college or university's right to determine who is taught; and second, such legislation infringes upon a private individual's right to determine whether or not his or her research on a test will be made public.

As to the first claim, it is not obvious that there is a connection between open-testing legislation and who is taught. Does the requirement to disclose test information in effect mean that the state determines who is taught? Open-testing proponents will probably argue that there is little factual basis for equating disclosure with selection, and the burden of establishing this factual basis would fall upon the opponents. Few would disagree, however, that legal disclosure might raise policy questions about selection criteria.

Other existing laws more directly affect the right to determine who is taught. For example, there are some nondiscrimination limitations on the admissions

process that private and public universities agree to accept as a condition to receiving federal funds. Consider also the Supreme Court's decision in *University of California Regents v. Bakke*,[8] which outlines the legal parameters for affirmative action programs in the postsecondary admissions process.

Two important factors in determining whether open-testing legislation unconstitutionally forces a researcher to disclose research data about a test would be (1) whether the researcher was employed by or had contracted with the test company, and (2) whether the test company used the research as the basis for validating and/or publicizing the test. If the researcher was employed by a test company to do the research on the test, and the test company used the research as the basis for validating and/or publicizing the test, then the argument in favor of a First Amendment right of the researcher not to disclose the research data would appear weak. On the other hand, if the test was not based in some way on the research and the researcher had no financial relationship with the test company, the argument in favor of a First Amendment right of the researcher not to disclose would appear strong.

In sum, the First Amendment issues would not appear to present a major obstacle to open-testing legislation, but such legislation could infringe upon the First Amendment rights of some individual researchers unless carefully drafted to avoid this potential problem.

4. Due Process

Due Process

The due process clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The due process clause of the Fifth Amendment is joined by another prohibition: "nor shall private property be taken for public use, without just compensation."

The claim is that open-testing legislation deprives testing companies of private property (the test and test data) without due process of law and without just compensation. The claim of private property interests in the tests is buttressed by their copyrighted status under the Federal Copyright Act.

Proponents of open-testing legislation will probably argue that test companies are not deprived of private property by such legislation because it requires only disclosure of information, and does not involve depriving the companies of legal ownership of the tests. In response, the test companies will probably argue that disclosure *in effect* deprives them of private property for two reasons: competitor companies unfairly reap the benefits of their private research, and disclosure of test questions and answers destroys their value for future use. The strength of this response will depend in large part upon the extent to which copyright law and other factors protect test companies' research against competitive emulation (compare with disclosure requirements for new food and drug products), and the extent to which test companies are able to pass on the increased cost of developing new test items to test takers (as discussed elsewhere in this report).

The argument claiming deprivation of private property is stronger where the test company is not a nonprofit organization. This argument will also be stronger where proprietary rights in the test have been established under copyright law (see copyright section below). Proponents of open-testing legislation, on the other hand, will probably raise questions about how "private" tests developed with the tax benefits of nonprofit status can be.

Assuming that test companies will prevail with their argument that disclosure is equivalent to a deprivation of the test, and that the test is private property within the meaning of constitutional provisions, a second and perhaps stronger argument likely to be advanced by the proponents of open-testing legislation is that the legislation does not force test companies to disclose test information. The legislative requirement is a *conditional* one, forcing disclosure *only if* the test companies want to use the test within the state. This argument would raise the question of whether test companies' access to students and other citizens within a state is a privilege that can be granted by the state or a private right that states cannot control.

Reviewing the judicial history of the "just compensation" clause of the Fifth Amendment in *Penn Central Transp. Co. v. New York*,[9] the U.S. Supreme Court noted that it had been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, and that resolution will depend largely upon the particular circumstances of each case:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. See *Goldblatt v. Hempstead*, [369 U.S. 590, 594 (1962)]. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e.g., *United States v. Causby*, 328 U.S. 256 (1946), then when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.
>
> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values.[10]

These factors indicate a difficult standard for test companies to meet if they are to prevail on a "just compensation" claim.

Although a remedy pursuant to a successful claim of deprivation of private property "without just compensation" could be substantial, test companies probably would not be satisfied by the likely remedy for a successful due process claim since it would only provide a right to procedural due process before deprivation rather than a substantive prohibition against that deprivation. A successful due process claim would raise the question of what kind of procedural hearing is required and whether it had been provided.

The due process clause has a substantive as well as procedural impact in some situations. The legal standard applied in modern substantive due process cases is usually not carefully set out, but state action is usually illegal if it (1) is arbitrary or capricious, (2) does not achieve any legitimate state interests, (3) frustrates any legitimate interest the state might have or (4) is fundamentally unfair. Whatever the exact wording of the legal standard, test companies and other opponents of open-testing would find it difficult to establish a substantive due process violation since the general standard is that state action

cannot be unreasonable, with unreasonableness being construed narrowly (e.g., rational persons would not disagree).[11]

5. Copyright Act

Copyrights

A new federal Copyright Act,[12] passed in 1976 and effective as of January 1, 1978, provides for a single system of statutory protection for all copyrightable works. The new uniform system encompasses prior copyrighted material, generally protects works for life-plus-50 or 75/100 year terms, and provides for five classes of copyrightable material including a broad category (Class TX) for nondramatic literary works. The law also recognizes the principle of "fair use" as a limitation on the exclusive rights of copyright owners, and indicates factors to be considered in determining whether particular uses fall within this category.

Test companies claim that the copyright law establishes proprietary rights in their tests that are infringed by open-testing legislation requiring disclosure of test items (questions and answers) and related test data. For example, the AAMC in *Association of American Medical Colleges v. Carey*[13] claims that the Medical College Admissions Test (MCAT) forms and studies "are copyrightable under the federal Copyright Act of 1976, 17 U.S.C. Sec. 102(a)."[14] The AAMC points to specific provisions in the Copyright law that recognize inclusion of secure tests by providing a definition of "secure test" (37 C.F.R. Sec. 202.20(b) (4)) and deposit requirements for secure tests (37 C.F.R. Sec. 202.20(c)(2)(vi)). The AAMC alleges that they have complied with all requirements of the Copyright Act and therefore have "... secured the exclusive rights and privileges in and to the copyright of all M.C.A.T. test forms and studies, including the exclusive rights 'to do and to authorize,' *inter alia*, the reproduction, distribution, and public display of these documents pursuant to 17 U.S.C. Sec. 106(1), (3), and (5)."[15]

Therefore the AAMC claims that Sections 341 and 342 of the New York Act will compel them to reproduce, distribute and display their test forms and studies in conflict with "the exclusive rights granted to plaintiff under the federal Copyright Act .... Accordingly, Sections 341 and 342 are preempted under the Supremacy Clause of the United States Constitution, Article VI, Section 2."[16] In a separate count the AAMC claims that the New York law also violates 17 U.S.C. Sec. 201(e) which provides that unless transferred by the individual author, "no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title."[17]

The New York defendants have not filed an answer to the AAMC complaint as of this writing,[18] but defendants in this kind of case are likely to raise questions about whether the specific test is covered by the Copyright Act, and argue that the disclosure required by their open-testing law falls within the fair use provisions of the Copyright Act. Section 107 of the Copyright Act provides that the fair use of a copyrighted work is not an infringement of copyright:

> In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and,
(4) the effect of the use upon the potential market for or value of the copyrighted work.[19]

In a historical note to this section of the law, the U.S. House of Representatives Committee on the Judiciary (House Report No. 94-1476) states that the above four standards provide "some gauge for balancing the equities."[20] The Committee also notes: "Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."[21] In stressing the need for a case-by-case balancing of the equities, defendants will probably also raise the broader question of whether the Act was intended to preempt a state's authority to regulate tests that affect its educational institutions and students.

A more basic issue underlies all of the specific statutory claims that will be raised by plaintiffs and defendants in this kind of litigation. Testing companies (plaintiffs) are likely to argue that disclosure is *compelled* by open-testing legislation, and states (defendants) are likely to argue that disclosure is required *only if* plaintiffs want to use the tests within their states. Thus the courts will be faced with an initial question of whether disclosure is a *requirement* of the particular open-testing law in question or whether disclosure is simply a *condition* of access to a market. And if conditional, do property rights established under the Copyright Act create any legal bar to the state's authority to create such a condition?

In sum, the copyright claim raises many unanswered questions, and further research in this area is in order. Many of these questions may be answered in the near future by the federal court's rulings in the AAMC challenge to the New York open-testing law.

6. Extraterritorial Issues

Extraterritorial Issues

On October 16, 1979, the New York Commissioner of Education provided an initial report on the meaning and application of the New York open-testing law. The report stated that "the Law applies to any test . . . *whether the test is administered in New York State or the results of the test are provided to institutions located within the State.*"[22]

This "extraterritorial" interpretation of the New York law has been challenged by CEEB in *College Entrance Examination Board v. Abrams.*[23] CEEB alleges that interpreting the law to include the results of a test administered outside New York State but provided to institutions located within the state is an attempt on the part of New York to exercise extraterritorial jurisdiction prohibited by, *inter alia*, the commerce clause, the due process clause, and the full faith and credit clause of the United States Constitution.[24]

CEEB claims that among the extraterritorial effects of the law are:

(1) CEEB would be required to disclose virtually all S.A.T. test questions used in test administrations, including questions used solely in tests administered outside of New York.
(2) CEEB would be required to provide all students registering to take the S.A.T. all of the information required by Sec. 343(1) of the Law because it would have no way of knowing in

advance whether a test score from an out-of-state test administration would, at some later time, be sent to a New York institution.

(3) CEEB could no longer send score reports of Connecticut, Indiana and Pennsylvania seniors to their state's scholarship program without the student's specific authorization.

(4) Because the Law requires public filing of all studies and reports pertaining to standardized tests, the College Board would have to file reports it prepares for institutions located outside New York. Since reports often contain confidential information relating to these institutions, many out-of-state institutions would probably choose to discontinue their use of this College Board service.[25]

No answer to the CEEB complaint has been filed by defendants as of this writing. A number of responses are possible. One response might be that the New York law is not intended to have the extraterritorial reach cited by CEEB, no official state interpretation to this effect has been or will be made, and therefore the CEEB claim presents no case or controversy for the court to decide. An alternative response might concede an extraterritorial effect of the law, but dispute the extent of that effect and/or contend that the extraterritorial effect does not substantially impede interstate commerce and thus is within New York's police power to regulate tests that affect its local educational institutions and students.

The general rule in determining undue burden on interstate commerce is stated by the U.S. Supreme Court in *Southern Pacific Co. v. Arizona:*[26]

> When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not *seriously* interfere with its operation . . . such regulation has been generally held to be within state authority . . . . But . . . the states have not been deemed to have authority to impede *substantially* the free flow of commerce from state to state . . . . (emphasis added).[27]

Factual evidence of the extent of the extraterritorial impact of the New York law and legal definition of the terms "seriously" and "substantially" would be central in applying this general rule.

Like the AAMC complaint, the College Board's complaint raises legal issues too diverse and complex to be discussed in detail in this report. Perhaps more important to legislators is the fact that, unlike the AAMC complaint, the CEEB complaint does not question the authority of a state to enact open-testing legislation, only the extraterritorial interpretation and effect of that legislation. Therefore the CEEB case and subsequent decision will be of greatest interest to state legislators who are considering open-testing legislation that may have a substantial extraterritorial effect.

7. Freedom of Information Statutes

Freedom of Information

Most freedom of information statutes apply only to *public* agencies and include numerous exemptions that have the effect of excluding test items from disclosure requirements.[28] The key data regarding validity studies of tests, and test questions with answer sheets, are usually not given to public schools or other public agencies by the testing companies. As a result, the testing information that can be acquired through most freedom of information laws is very limited. Open-testing proponents of course argue that the testing

companies themselves, especially those with nonprofit tax status, are quasi-public agencies, and should be treated like public agencies for purposes of disclosure.

Open-testing opponents cite freedom of information statutes as evidence of legislative intent to omit testing companies from full disclosure. Proponents argue that such an inference is questionable and that even if valid does not legally preclude the kind of change in legislative intent that they advocate. In any case, freedom of information statutes do not provide a strong legal basis for either the proponents or the opponents of disclosure of this kind of test information.

Postscript. Freedom of information statutes of course provide access to some testing information, depending upon the state and the exact statutory language involved. For example, a New Jersey Superior Court held that parents have a right under the New Jersey Right-to-Know Law to inspect computerized systemwide, grade-by-grade *results* of a standardized testing program administered in public schools.[29] But this holding did not extend to a right to access to test questions and answers. Similarly, students do not have access to test items and related test data pursuant to the "Family Educational Rights and Privacy Act" (FERPA) (the "Buckley amendment") since education agencies usually are not provided with this data by the test companies. If educational agencies did have this data, disclosure under FERPA would be limited on an individual basis to personally identifiable data related to the test.

Students have legal access to test items and related data in some limited situations, primarily where they and a court need the information to determine possible violation of civil rights. For example, the federal district court in *Debra P. v. Turlington*[30] ordered test items and related test data to be made available to the plaintiffs in order to determine the validity of their claims that the Florida competency testing program violated various rights guaranteed them under the Constitution and federal law. The protective order was limited to the plaintiffs, their attorneys and experts, who were in turn prohibited from disclosure of the data beyond that defined group. Similarly, a handicapped student would have a strong legal claim, under the Education for Handicapped Children Act of 1975 and under the Fourteenth Amendment, to access to this kind of test data in order to determine the validity of an educational classification based upon the results of a standardized test. This would also be a limited disclosure based upon individual rights and would probably require a court order. We are not aware of any case where a student in a postsecondary education institution has established a legal right to access to test items and related data.

8. Other Implications

Other Implications

Open-testing legislation, at the federal or state level, is likely to lead to two further "legal" developments worth noting: one legislative and one litigative. Proponents of open-testing legislation would probably see both as positive developments, and opponents would probably take the opposite view.

If open-testing legislation in its present form survives its legislative, legal and practical effects tests, one likely development is expansion of the legislation to include other forms of testing. Current legislation is limited to postsecondary and professional admissions tests, with some "low volume" tests being exempted. The equal protection arguments raised against such exemptions[31] inadvertently form the policy basis for their subsequent inclusion, although the legislative classification based upon low/high volume tests would appear to

meet the legal standard of rational relationship to a legitimate state purpose. As noted elsewhere in this report, the Gibbons bill would also encompass many employment tests.

Other forms of testing probably have as strong or even stronger policy bases for inclusion. For example, various forms of secure certification tests are used as the predominant and even exclusive arbiters of competence. Consider, for example, bar examinations and medical boards. Consider also competency tests used as a prerequisite for a high school diploma. The rationale used by some testing companies in opposing disclosure of aptitude tests would specifically exclude many achievement tests like competency tests which are designed in part for instructional and remedial purposes.[32] The potential educational, economic and psychological injury of state certification of competence or incompetence based upon a single, secure, standardized test, was recently underscored by a federal court in *Debra P. v. Turlington.*[33] Intelligence Quotient (IQ) tests also are used or misused in ways that have profound effects upon the life-chances of individual test takers. To say this is not to imply a legal basis for inclusion of other kinds of tests; only to suggest a strong policy basis for expanded legislation if there is a sound policy basis for current open-testing legislation.

A second development likely to follow open-testing legislation is litigation by test takers who challenge the intrinsic validity of a particular test and/or the alleged misuse of a particular test. Current litigation, based in large part upon court-ordered disclosure of secure standardized tests, is indicated by *Debra P. v. Turlington, supra* (competency tests) and *Larry P. v. Riles*[34] (IQ tests). Open-testing legislation making it easier for scholars, test takers and lawyers to examine a particular test will also make it easier for them to challenge decisions based upon those tests. Individual test items will probably receive greater scrutiny. Answers deemed correct by the authorities, for example, could be challenged by test takers who argue that one or more of the distractors is as good or an even better choice. Some suits of this kind would be dismissed by the courts as frivolous, but others would be heard if the test takers could show sufficient questionable items within a test that collectively made an important difference in their scores and in their educational or occupational prospects.

As with expanded legislation, proponents of open-testing would probably see this expanded litigation as a healthy development leading to more public information and scrutiny about and less misuse of standardized tests. Similarly, opponents of open-testing would probably view this kind of litigation as further complicating important evaluation and certification functions.

9. Conclusion

Conclusion

A tentative conclusion based upon the above discussion is that open-testing legislation is not prohibited by existing constitutional or statutory law. One exception to this general conclusion might rest upon the copyright claim, as exemplified by the AAMC case.[35] While not challenging the authority of a state to enact open-testing legislation, the CEEB case should clarify the extraterritorial extent of that authority. Legal counsel to state legislatures will want to review the arguments as refined in forthcoming legal briefs in these cases, and with reference to the specific legal and factual situations in their states. Some states may want to delay consideration of open-testing legislation until the legal parameters of their authority are clarified by decisions in these cases.

Footnotes

1. Association of American Medical Colleges v. Carey, C.A. No. 79-CV-730 (U.S. Dist. Ct., N.D.N.Y., Complaint filed November 9, 1979). See *infra* note 13 and text relating to *infra* notes 13-21.

2. College Entrance Examination Board v. Abrams, No. ___ (Sup. Ct. N.Y., Complaint filed ___ 1979). See text relating to *infra* notes 22-27.

3. In fact, it is difficult to even identify all of the issues that may become important because this report is being typeset (January 18, 1980) before the parties to current litigation have had a chance to brief the legal merits of their respective sides. One exception is the AAMC's "Memorandum in Support of Motion for Preliminary Injunction," *infra* note 13.

4. The exact legal basis for open-testing legislation at the federal level could be the Commerce Clause of the U.S. Constitution (Art. 1, sec. 8, cl. 3) and at the state level it could be a constitutional education clause or the more general "police power" of the states (see, e.g., Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U.S. 613, 622 (1935): "The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations .... It is the governmental power of self protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury").

5. 47 L.W. 4233 (3/6/79).

6. *Id.* at 4233.

7. *Id.* at 4236.

8. 438 U.S. 265 (1978).

9. 438 U.S. 104 (1977).

10. *Id.* at 124. The quotation from the *Mahon* case cited by the Court continues: "As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have limits, or the contract and due process clauses are gone." 260 U.S. at 413.

11. See M. McClung, "The Problem of the Due Process Exclusion," 3 *J.L. & Educ.* 491, 495—501 (1974).

12. 17 *U.S.C.* Sec. 101 *et seq.*

13. C.A. No. 79-CV-730 (U.S. Dist. Ct., N.D.N.Y., Complaint filed November 9, 1979). The AAMC has filed a "Motion for Preliminary Injunction," and a "Memorandum in Support of Motion for Preliminary Injunction" (December 18, 1979). Defendants' "Memorandum in Opposition ..." (January 3, 1980) raised procedural objections regarding jurisdiction, proper defendants, and laches, and therefore did not brief the merits of the case. A hearing on the motion was held on January 7, 1980.

    NOTE: As this report is being typeset, District Judge Neal G. McCurn, relying primarily upon the copyright claim, has handed down a decision granting plaintiff's motion for a preliminary injunction: The standard in the Second Circuit for issuance of a preliminary injunction is that:

    > "there must be a showing of possible irreparable injury *and* either (1) probable success on the merits *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." . . .

    . . . The Court finds that in this case, the second criterion has been satisfied, warranting the issuance of a preliminary injunction enjoining enforcement of Sections 341 and 342 of the Education Law against plaintiff, pending a determination on the merits.

    "Memorandum-Decision and Order" (mimeo 21 pages, January 21, 1980) at 12.

14. AAMC Complaint, *supra* note 13 at 7 (par. 22).

15. *Id.* at 7 (par. 23).

16. *Id.* at 10 (par. 37).

17. *Id.* at 12 (par. 47).

18. See *supra* note 3.

19. 17 *U.S.C.* Sec. 107.

20. House Report No. 94-1476, cited at 17 *U.S.C.A.* Sec. 107.

21. *Id.* For one example of balancing the equities under the new Copyright Act, see Meeropol v. Nizer, 560 F.2d 1061 (2 Cir. 1977), *cert. denied* 434 U.S. 1013 (1978). The *Meeropol* Court cited the need to balance "the exclusive rights of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science, history, or industry." 560 F.2d at 1068.

22. Cited in CEEB v. Abrams, *infra* note 23, at 10 (par. 27).

23. No. ___ (Sup. Ct. N.Y., Complaint filed ___ 1979).

24. See six counts set forth in *CEEB* Complaint, *supra* note 23, at 20-23.

25. *Id.* at 12-13 (par. 33).

26. 325 U.S. 761 (1945).

27. *Id.* at 767. The remainder of this citation reads: "or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." Although not argued in the CEEB complaint, some proponents of open-testing would make this claim for federal legislation.

28. See, for example, exemptions to the Federal Freedom of Information Act, 5 *U.S.C.* Sec. 552(b); and exemptions to the New York Freedom of Information Law Section 87(2) including exceptions for "trade secrets" and competitive injury at Section

87(2)(d). The Weiss bill and the New York law are of course designed to remove this kind of exemption for the test items and data comprising specified tests.

29. Citizens for Better Education v. Board of Education of Camden, 308 A.2d 35, 124 N.J. Super. 523 (App. Div. 1973).

30. 474 F. Supp. 244 (M.D. Fla. 1979).

31. For example, the *AAMC* Complaint, *supra* note 13 at 15 (par. 62-66) raises a Fourteenth Amendment equal protection challenge based on the exclusion of College Board Achievement Tests and GRE Advanced Tests from the New York open-testing law.

32. See, for example, John Fremer & Alice Irby, "Why Some Tests Should be Secure?" (Preliminary Paper, April 1979, Educational Testing Service): "Although this paper argues the value of test security for certain testing programs that are associated with selection decisions about individuals, there are many testing contexts in which security is not a critical issue .... It is clear that when examinations are closely linked to an ongoing instructional process ... individual test forms are published. For these examinations test security after administration and, in some cases, even during the administration is not a primary concern." *Id.* at 2.

33. 474 F. Supp. 244 (M.D. Fla. 1979).

34. ___ F. Supp. ___ (N.D. Cal., decision 10/16/79).

35. As this report is being typeset, the Court has granted the AAMC's motion for a preliminary injunction. See *supra* note 13.

V. INITIAL IMPACT OF FULL DISCLOSURE LEGISLATION

It is too soon to gauge the full impact of the New York law upon students, higher education institutions and test companies. However, we can make some general observations and list the specific actions that have taken place up to this moment. Everything in this chapter must be considered tentative and subject to change.

A. General

Period of Adjustment

The enactment of a controversial law is always followed by an unstable period during which ambiguities in the law are ironed out in the legislature or the courts, enforcement agencies struggle to prepare interpretive guidelines and everyone waits to see if their prophecies will come true. No one should be surprised if some members of the testing community exercise their right to lobby against further legislation, file suits or ask for clarification. This is a normal course of affairs. Nor should there be surprise if testing companies request more time to adjust to the law. Admissions testing has been operating in a certain way for half a century, so change is unlikely to take place overnight.

Situations Change

B. Specific

Impact in New York to Date

As of January 1980, the following tests given in New York and subject to the law have been withdrawn by their sponsors:

Withdrawn Tests

Allied Health Entrance Examination
Allied Health Professions Admission Test
Aptitude for Practical Nursing Examination
Aptitude Test for Allied Health Programs
Doppelt Mathematical Reasoning Test
Entrance Examination for Schools of Health-Related Technologies
Entrance Examination for Schools of Nursing
Entrance Examination for Schools of Practical/Vocational Nursing
Health Occupations Aptitude Examination
New Medical College Admissions Test
Miller Analogies Test
Minnesota Engineering Analogies Test
Nursing School Aptitude Examination
Optometry College Admissions Test
Pharmacy College Admissions Tests
Pre-Admission Assessment for Practical Nursing
Pre-Nursing and Guidance Examination
Pruebas de Aptitud Academia (Spanish S.A.T.)
Veterinary Aptitude Test

Two of these tests, sponsored by the National League for Nurses — the Pre-Admission Assessment for Practical Nursing and the Pre-Nursing and Guidance Examination — may return to New York in the spring. Of the remaining tests, twelve are sponsored by the Psychological Corporation, three by the Psychological Services Bureau, one by the American Association of

Medical Colleges and one by the College Board. Most of these tests are given to small numbers of students. If the legislation is amended to exempt tests taken by small numbers of students, some or all of these tests might return to New York. As things stand, the sponsors of these tests feel that they do not have a sufficient volume of test takers among whom to spread the costs of developing more forms of the tests.

Tests Still Offered

The tests that will continue to be offered in New York are: The American College Testing Assessment Program, the Dental Admission Test, the Graduate Record Examination, the Graduate Management Admissions Test, the Law School Admissions Test, the Preliminary Scholastic Aptitude Test/National Merit Qualifying Test, the Scholastic Aptitude Tests and the Test of English as a Foreign Language. However, these tests will not be given as often as they have been. The College Board plans to cancel four of the eight planned 1980 administrations, three of which are Sunday administrations provided for individuals who cannot take exams on Saturdays for religious reasons. In addition, flexible services for the handicapped will be reduced and large print, braille and cassette versions of the tests will be reconsidered. The Graduate Record Examination will change its number of administrations from six to four, and the Law School Admissions Council has dropped the number of administrations of the LSAT from four to three. At the moment, it appears that the cancellations of administrations hit hardest at those students who cannot take tests on Saturdays for religious reasons. However, it is possible that an amendment to the law will exempt Sabbath tests, thus reinstating them.

Impact on Test Administration

A glance at the list of tests withdrawn reveals that health professions are heavily affected. Scholarships based upon admissions test scores in Medicine might be unavailable to New York students until a new procedure for awarding them is found. State Department of Education officials fear that adult applicants with dated backgrounds and minority candidates from unknown school systems are most likely to suffer if the health professions no longer use the tests to select candidates.

Increased Costs

The College Board has announced an increase of $1.75 in the cost of the SAT. In addition, of course, students who request test companies to return the tests will have to pay a surcharge for the service ($4.65 for the SAT, $4 for the LSAT, $5.95 for the GMAT and $5.50 for the GRE). The additional cost will most likely hurt poorer students the most.

New York state medical schools have waived the requirement for the MCAT scores, saying they were never decisive anyway as determiners of admission. However, New York students who wish to take the MCAT will have to leave the state in order to do so, unless the law is amended to exempt it.

Potential Changes in the Offing

As noted earlier in the report, the Association of American Medical Colleges has challenged the legality of the law and the College Board has filed a claim asking for an injunction against the extraterritorial provisions of the law. The outcomes of these actions will clarify the situation somewhat. In addition, a number of amendments to the law are being considered that might change its immediate impact.

No one knows how colleges and universities will respond to the provision that test companies must file copies of all validity studies conducted for institutions. The most likely outcome is that they will no longer ask for such studies or will ask that the law be amended to allow anonymity for institutions. Should they curtail validity studies and evaluations of their admissions procedures, testing representatives fear that the consequent lessening of test

score use will redound upon already disadvantaged applicants. At the moment there is some possibility that this provision of the law will be amended, as well.

Clearly, the New York situation is in so much flux that it is not possible yet to judge the impact of the legislation. Amendments are being proposed that could change the impact considerably and the court decisions could alter the situation substantially. Legislators considering testing bills would do well to study the New York example carefully, paying special attention to upcoming amendments and reactions to them.

VI. STRATEGIES FOR EVALUATING THE DEBATE AND SUBJECTS FOR FURTHER STUDY

What Are the Primary Issues?

The Needed Data?

Having arrayed arguments for and against testing legislation, and having sketched potential legal issues surrounding it, it is time to boil matters down to essentials. What are the primary issues? What data are available to help someone weigh the merits of various arguments? When critical data are missing, how might one gather the needed information?

It has already been pointed out that when they are discussing many of the issues, the opponents do not really engage one another. They proceed from different assumptions and they disagree about facts, interpretations of the facts, warrants for drawing conclusions from the facts and conclusions.

Lack of Evidence/Data

The testimony also abounds with assertions for which little evidence is produced and issues that do not bear upon the laws and bills under consideration. This lack of hard data and these excesses of emotion about other matters are striking features of the debate. They are telltale signs that the ostensible issue is, in part, a surrogate for other, deeper, undeclared issues.

The Deeper Issues

Among those are some fundamental questions about equal opportunity, meritocracy, and elitism that have troubled this country for generations. How do Americans get ahead and what role do the schools play in helping them? Who is making the decisions about whom, on what authority and with what consequences? Today, test manufacturers are on the carpet because their products obviously play a role in the selection/sorting process. It would not be surprising if another institution is called to the carpet next, and, after that, more and more institutions, until answers to those fundamental questions become more acceptable.

Global Issues Aside, Examine Primary Issues

As important as it is to explore many of these greater issues, it would be a departure from the intention of this report to pursue them. So, in the interests of simplification, but acknowledging that the subject of testing legislation is tied to some profound social policy matters, we should eliminate the more global, social arguments about Testing and the Test "Industry" from our list of primary issues. The proposed and enacted legislation focuses on a relatively narrow arena and a relatively narrow range of actions within that arena. The merits of any specific piece of legislation should be evaluated in terms of the degree to which it accurately characterizes, directly addresses and is most likely to beneficially affect the testing process — either in higher education (the arena addressed by most of the legislation) or in elementary and secondary education (the arena addressed by the New Jersey bill). Where such legislation may lead or how it might fit into a conspiracy to "kill the messenger" or "destroy testing" or drive the "little guys" out of competition or cover up structural inequities inherent in capitalism, are issues beside the immediate point.

The Other Issues

The remaining issues can be divided into those in which empirical evidence plays a primary role and those resting upon principle. To the extent that regulatory legislation addresses a concrete problem that can be remedied legislatively, its proponents must be able to produce evidence of the problem and evidence that the law will correct it. To the extent that the legislation is called for on a matter of principle — say, the principle of "fairness" or the principle that "sunshine" statutes should be extended to cover this area — then

the proponents need to persuade us that the importance of the principle overrides objections to its implementation and the social benefits outweigh the costs.

A. Evaluating Assertions About the Importance of Tests, Misuse and the Effects of Legislation

Evaluating the Arguments

Leaving the New Jersey and Gibbons bills aside, for the moment, the arguments that rest more upon evidence than principle can be collapsed into three general propositions: (1) admissions tests seriously affect the life-chances of American students; (2) admissions tests are being misused/misunderstood/misadvertised in ways that place some students at a disadvantage; and (3) testing legislation requiring full disclosure will soften the influence of the tests upon life-chances and will help correct problems stemming from misuse. The first proposition must be substantially true in order for the second to be important enough to require the third. Principles aside, if all three are supportable propositions, testing legislation might make sense. If any of them is unsupportable, testing legislation may not be necessary.

Proposition 1. Admissions tests seriously affect the life-chances of American students.

Admissions Tests Affect Life-Chances

The key term here is the relative word "seriously." Supporters of legislation have argued that the tests play an important role in individuals' professional lives, but they have not specified how important. Are admissions tests as important as supporters of legislation assert? There are several ways to find out.

How Seriously?

What Do Students Think?

First, do students believe that admissions tests heavily influence their life-chances? We know of no systematically gathered data about this. Anecdotal evidence, and the fact that student groups lobbied for legislation in California and New York, would indicate that many students do perceive the tests as having important influences on their careers. But the apparent evidence that the vast majority of students go to their first-choice undergraduate institutions, and the apparent relaxation of admissions standards due to lower enrollments, suggest that the influence is not particularly great, at least at the undergraduate level. It appears that as the stakes get higher and the competition becomes more fierce — that is, at the professional school level — the tests become more important.

Do Some Admissions Tests Have More Impact Than Others?

This leads to a second clarifying question: Do some admissions tests have more impact on lives than others? It certainly appears that in fields like medicine and law, where the number of schools and students is highly restricted, the consequences of low scores are bound to be more dramatic. Whereas almost no undergraduate students will fail to find *some* school to attend, a certain percentage of law or medical school applicants may find themselves shut out of those fields entirely if they do poorly on the admissions tests. Certainly, some must be shut out because there is not enough room for all applicants. It may be that some *should* be shut out. Perhaps many of them simply would not make good doctors or lawyers. The question is whether or not, for those people who do not gain entrance to professional school, the admissions test was a major factor or only one of many factors.

To really gauge the importance of the test, it might also be useful to ask what happens to people who apply to professional schools and are turned down. To be sure, if the decision to deny admission was unfair, there is no real compensation. It would nevertheless be useful to know whether the aspiring medical doctor becomes, instead, a chemist. Turned down by the law schools,

does the candidate go on to pursue a Ph.D. in history? What percentage of the rejected applicants continue to apply until they are finally selected? What happens to the rest? When all is said and done, how significantly did the test affect the life-chances of individuals who already have bachelor's degrees and are motivated enough to want to go further?

Are Some Admissions Tests Used Differently Than Others?

A third question that might be asked is: Are some admissions tests used differently than others? If graduate and professional school tests have more impact, it may be because the competition is so fierce or it may be because they use (or misuse) test scores differently. For instance, it may be that the people who make admissions decisions for medical school are quite different in background, training and knowledgeability about testing than people who make admissions decisions for nursing schools, undergraduate institutions or law schools.

If there were more information about student perceptions and degrees of test impact at various levels or in various fields, it would be easier to judge this issue. But one might be confusing test influence with some other, less obvious factors that influence life-chances. Even if students *believe* that the tests are influential, the students may be wrong; the tests may simply "stand for" and legitimize some more powerful, but less visible, selecting device. There is ample evidence that socioeconomic factors have a profound influence upon life-chances. In order to more fully understand the impact of test scores one would want to know how they relate to those other factors. If test scores are closely related to socioeconomic selecting factors, then they may not have much real influence upon life-chances at all.

How Do Scores Relate to Socioeconomic Selectors?

Proposition 2. Admissions tests are being misused/misunderstood/misadvertised in ways that place some students at a disadvantage.

How Are Admissions Tests Used?

The search for support of this proposition should begin with distinctions between admissions tests at various levels, institutions and professional schools. Who makes the admissions decisions? What training have they had? What other criteria do they examine? The recent *College Board-AACRAO Survey of Undergraduate Admissions Policies, Practices and Procedures* (Van Dusen, 1979), provides some useful information about the situation at the undergraduate level. According to that survey, two-thirds of the public four-year institutions studied and three-fourths of the private four-year institutions required either SAT or ACT test scores as part of the credentials package for each applicant. Other important parts of the credentials packages were high school transcripts, health statements, letters of recommendation and personal essays or autobiographical statements (those last required by 40 percent of the private four-year institutions). Institutions also prefer a certain number of years of high school study in English, mathematics and so on, as part of the selection criteria.

Are Scores Critical Credentials?

When asked whether ACT or SAT scores were the single most important factor in the decision-making process, very few schools replied affirmatively. Ninety-nine percent of the most selective institutions reported that the scores were *not* the single most important factor. However, about 60 percent of the public and 54 percent of the private four-year institutions said that test scores are a "very important factor" in decision making. The percentages are much lower for the "open-door" admissions and two-year institutions, which the majority of America's students attend.

These statistics suggest that, at the undergraduate level, test scores are rarely the sole criterion for admissions, although they are considered very important

by a majority of four-year institutions. The data do not prove that institutions which consider test scores very important are not still overestimating their precision or overvaluing them in some way. In order to get at the misuse problem more directly, we need even more information about both undergraduate and graduate selection processes. Some in-depth studies might be useful, as would a survey of admissions officers' knowledge about the characteristics and limitations of aptitude tests. If we found that many of them harbored misconceptions, we would not only have grounds to support allegations of misuse by institutions but we would know what kinds of abuses were most prevalent and in need of correction.

How Well Trained are Admissions Officers?

One misuse issue that has surfaced often in testimony is the "cutoff score" controversy. Some proponents of legislation argue that institutions use cutoff scores to determine eligibility. This practice would represent a misuse of the tests, most of which are not sufficiently accurate to permit sharp distinctions in scores. Representatives of the institutions generally deny that cutoff scores exist. Obviously, the test scores are used for making *some* discriminations; all other things being equal, an applicant with a higher score is probably going to be selected over one with a lower score. Just as obviously, most universities can demonstrate that the test scores of their freshmen span a considerable range of percentiles.

How Are Cutoff Scores Used?

Another approach to the misuse problem would be to assess the kind and amount of data test publishers now make available to test score users. Are their handbooks and explanatory materials readily understandable? Do they explicitly emphasize test limitations or are the limitations only implicit in statistics that few readers will attend to or understand? Are the handbooks and materials widely available? Are they updated often? What do admissions people do with the handbooks?

Is Test Information Available?

A third approach to misuse is to develop deeper understanding of the social forces that seem to promote it. Is there a cultural disposition to automatically accord things like tests a truth value they do not deserve? What are the roots of that disposition? More information about this would clarify the context in which certain misuses take place and perhaps enable us to design corrective strategies for all the actors involved, including testing companies.

Is There a Cultural Disposition to Misuse?

Some proponents of legislation argue that simply administering a badly designed test constitutes misuse. In other words, the issue of abuse is inseparable from the issue of test quality: a bad test will be misused as soon as anyone bases a decision upon it. This point of view would distinguish two categories of misuse: misuse at the hands of people who use the tests and "intrinsic" misuse that necessarily follows from a bad test. It is easier to argue that disclosure legislation will not prevent the former than it is to argue that it will not affect the latter. The problem of intrinsic misuse relates to all the issues raised in Chapter I about the quality of standardized tests. If full disclosure reveals that particular tests do not meet reasonable standards of quality, it will prove that intrinsic misuse does indeed exist and it will provide some pressure to raise standards or decrease dependence upon the test scores.

Do Bad Tests Constitute Misuse?

Proposition 3. Regulatory legislation requiring full disclosure will soften the influence of tests upon life-chances and will help correct problems stemming from misuse.

One way to test this proposition is to look at the past. Are there other areas in which legislation has accomplished similar goals? What benefits have been reaped from various other "truth" and "sunshine" bills? Do the bills and laws go to the heart of the problem?

Has "Truth" Legislation Accomplished Reform?

One way in which supporters of full disclosure feel that the law can correct abuse has already been noted: they feel that it will raise consciousness about the limitations of tests and force test developers to meet standards of quality that are acceptable to the public as well as to psychometricians. Those test developers who have tied test quality to the technical issue of security have been unable to agree, of course. To them it is a contradiction in terms to ask for a "quality" test that is not secure and cannot be confidentially validated for individual institutions. They feel that a paradoxical outcome of the law could easily be that in proving that their tests are of high quality in some respects, the test companies will lower the quality of the tests in other respects. In order to understand this dispute more clearly, one needs to know what "quality" means to all actors in this drama and whether there are not some combinations of technical and lay definitions that would satisfy most reasonable people. Otherwise, the effect of the legislation upon test quality is moot.

Will Legislation Raise Consciousness?

What Does "Quality" Mean to Both Sides?

Will the laws correct misuse of tests and scores by counselors, personnel officers, admissions officers and others (assuming such misuse exists)? The effect of the laws upon users is somewhat indirect, since the laws regulate only the test manufacturers. To the extent that practices change while the laws are in effect, some might find a causal connection, but it would be difficult to prove.

Will Laws Affect Admissions Practices?

Another way to test this proposition is to look toward the future. New York and California have enacted their testing laws, and others should be able to learn from their experiences. There is a great opportunity here to gather some prelegislation data bearing on the key issues at stake and initiate some continuing efforts to monitor events.

A final question about this proposition is whether there are other ways of correcting the problems short of state or federal legislation. Will test companies move to correct the perceived problems on their own, without governmental regulation? How enforceable are the APA standards? Could the psychometric and admissions communities take a stronger role in setting and enforcing standards? Whether or not the testing companies would have moved in directions their critics have urged without legislative hearings over the last year, one cannot know. But it is clear that they are now moving in those directions, faster than ever. The *Public Interest Principles* released in January 1980 by the Educational Testing Service, the College Board, the Graduate Management Admission Council, the Graduate Record Examinations Board and the Law School Admission Council, represent an attempt to be responsive to the issues raised by the legislation, without endorsing the legislation itself. Clearly, the legislation has already had some impact on testing activities.

Are There Nonlegislative Remedies?

B. Evaluating Arguments From Principle

Conceivably, someone could gather the information required to test the foregoing propositions and conclude that the evidence is not sufficient to make the case for legislation. But this would not be the end of the matter. There remain strong arguments from principle to contend with. The most common one is expressed in the phrase by which all the legislation has come to be known: truth in testing. The argument is that this is a matter of truth, fairness and open governance. Against such ideals, technical or financial arguments should not prevail.

Evaluating Opposition to the Argument From Principle

Stated so baldly, the issue looks easy to decide. Any red-blooded American will come down on the side of truth and fairness. Indeed, for some people, the issue

is just that simple and the decision just that automatic. However, it is somewhat more complex. To begin with, the use of the word "truth" begs the question in this arena just as it does in lending or advertising. It is a political, not a descriptive term, more divisive than helpful. The term fairness is more comfortable for both sides. Strenio puts the fairness argument in its strongest form in *The Debate Over Open Versus Secure Testing: A Critical Review*, when he points out that open testing might be more fair to individual test takers (who have a right to know the basis on which they are judged), more fair to the general public (which is seeking accountability) and more fair to the testing companies (who have a right not to be unfairly accused of hiding something). In addition, to the extent that admissions tests are defacto instruments of public policy, open testing is more fair to our society, which, being democratic, should prefer governance in the open.

The Fairness Argument at Its Strongest

Will Open Testing Lead to Further Unfairness?

Opponents of legislation argue that fairness is already at the heart of test design, development, administration and use. The point of having secure, standardized tests is to give decision makers information about students that does not confer unfair advantages to some of the students. From their point of view, an admissions process resting upon political judgments and no standard against which to measure academic abilities of people from very different backgrounds would be grossly unfair. If disclosure legislation were "fair" to the students who wanted to see their tests but, at the same time, destroyed security, eroded the quality of tests and reduced confidence in them, it would end up being "unfair" to a much larger group of students and to the society at large.

The fairness issue, then, boils down to a matter of competing public interests, and presents a final proposition to test. The proposition advanced by opponents of the legislation is that in being fair to one group we may be imposing unfairness upon other groups. To test the proposition, one should know whether, in fact, test security is essential to test validity; whether disclosure will erode test quality and confidence in test scores sufficiently to destroy the utility of admissions tests; and whether, in fact, a decreased dependence upon standardized test scores would take the country back to less fair standards for admission to higher education.

Is Security Central to Validity?

Is security so central to the validity of the tests that to breach it is inevitably to lower the quality and utility of the tests? As noted in Chapter III, the Association of American Medical Colleges argues that it is and so do a number of prominent psychometricians. But there are also psychometricians who claim that security need not be tied to validity and utility and that open testing is feasible. Apparently the best answer to this question is that it depends upon the test, its design and its use. The debate could profit from a clear explanation of this point on a test by test basis.

Will Lower Quality Tests Result From Disclosure?

Will the need to create more test questions inevitably reduce their quality? Some test constructers argue that in certain subjects, the number of good questions is limited and disclosure will sooner or later exhaust the supply, lowering the quality of the test or ruining its predictive validity. Some will counter that ways of conceptualizing subject matter areas change over time, so the tests will have to change along with them. Static subject matter areas that are exhaustible do not exist, they argue, for if they did, knowledge would be standing still.

Can Items Be Reused?

Is it necessarily true that exercises, once released, can *never* be used again? Perhaps, after a certain period of time, old exercises can be reused with little or no damage to a test's validity. It is a testable hypothesis.

Will Confidence in Tests Suffer?

Will disclosure erode confidence in the tests among users? The answer would seem to depend upon the answers to the first two questions. If responsible persons demonstrate that disclosure will not impair the quality of certain tests then there is no reason why users of those tests should lose confidence in them.

Does Less Confidence in Tests Necessarily Lead to Less Equitable Decision Making?

If test users do lose confidence in the tests, will their decreased dependence upon the tests lead to less fairness in their decisions? To the extent that admissions people do not rely heavily upon test scores, there should be little change in the fairness of their selection procedures. To the extent that they rely heavily upon test scores, the answer depends upon their confidence in available alternatives such as grade point average or institutional tests. Certainly the total disappearance of a standardized measure against which to compare students from differing backgrounds would affect the fairness of the admissions process. But there is no evidence that testing legislation will necessarily lead to the disappearance of standardized tests. Fear on these grounds appears premature.

The proposition that disclosure necessarily leads to lower quality tests and thus to an unfairness worse than the unfairness the legislation seeks to redress, needs more comprehensive testing before it can be said to be proven.

Critical Questions Before Legislation

The preceding discussion suggests that the following are critical questions each person confronting this issue must answer in order to arrive at a position:

1. Is there a "problem" with testing that requires state or federal legislative action?
2. Is open testing technically feasible? for all tests or only certain ones?
3. What will be the consequences of open testing for various kinds of tests and levels of education?
4. Will open testing erode or enhance confidence in the tests? with what result?
5. Will any personal, social or educational benefits of open testing be offset by such problems as decreased validity, increased cost or reduced use of the tests?
6. Do test companies already release sufficient information?
7. Are there partial disclosure plans that would be preferable to full disclosure?
8. What is the magnitude of standardized test misuse? in admission to postsecondary schools? professional schools? elementary and secondary education?
9. Will disclosure legislation correct misuse?
10. What legal and constitutional problems are raised by which provisions in current testing laws?

Where one stands on this complex issue will depend upon the answers to the questions raised by these propositions. People who feel that the burden of establishing the need for legislation rests upon those who are drafting it are likely to want to test the first three propositions. Those who feel that opponents of the legislation must prove that the fairness principle does not apply are likely to want the last proposition tested. It should be clear that both proponents and opponents of legislation have homework to do. If legislative debate does nothing else than bring more information and clarity to this vague public policy area, both sides will have been well served by it.

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APPENDIX A

96TH CONGRESS
1ST SESSION

H. R. 3564

To require all educational admissions testing conducted through interstate commerce, and all occupational admissions testing (which affects commerce) to be conducted with sufficient notice of test subject matter and test results, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 10, 1979

Mr. GIBBONS introduced the following bill; which was referred to the Committee on Education and Labor

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A BILL

To require all educational admissions testing conducted through interstate commerce, and all occupational admissions testing (which affects commerce) to be conducted with sufficient notice of test subject matter and test results, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Truth in Testing Act of 1979".

SEC. 2. As used in this Act—

(1) the term "educational admissions test" means any test of aptitude or knowledge which—

(A) is administered to individuals in two or more States,

(B) affects or is conducted or distributed through any medium of interstate commerce, and

(C) is used as part or all of the basis for admitting or denying admission to an individual to any institution of higher education;

(2) the term "occupational admissions test" means any test which is used as part or all of the basis for admitting or denying admission to an individual to any occupation in or affecting interstate commerce;

(3) the term "test" includes any aptitude or achievement examination, whether written or oral, and includes any objective multiple choice, machine scored, essay, practical, performance, or demonstration examination;

(4) the term "test score" means the numerical value given to the test subject's performance on any test;

(5) the term "person" includes individuals, corporations, companies, associations, firms, partnerships, societies, joint stock companies, and agencies and instrumentalities of States and local governments; and

(6) the term "institution of higher education" has the meaning set forth in section 1201(a) of the Higher Education Act of 1965 (20 U.S.C. 1141(a)).

SEC. 3. The Congress hereby finds and declares that—

(1) testing of scholastic aptitudes and achievements has become a principal factor in the admission of individuals to public, as well as to private, institutions of higher education and that therefore equal opportunity under the law requires that that testing be conducted in a manner which will ensure the equal rights and fair treatment of such individuals;

(2) testing of skills for entry into an occupation, whether of a professional, craft, or trade nature, is a critical factor governing the free flow of individual skills in interstate commerce and seriously affects the Nation's capability for economic growth; and

(3) the rights of individuals and the national interests can be protected without adversely affecting the proprietary interest of any entity administering tests by simple requirements governing proper prior notice to individuals of the subject matter to be tested and proper subsequent notice of test results and their uses.

SEC. 4. It is the purpose of this Act to prohibit the conducting of educational and occupational admissions tests unless such tests are administered in a manner to protect the

rights of the individuals tested and to grant a Federal cause of action to any individual adversely affected by the administration of any such test in violation of this Act.

SEC. 5. It is unlawful for any person to administer any educational or occupational admissions test to any individual unless such test is administered in accordance with the requirements of section 6 of this Act.

SEC. 6. (a) Each applicant to take any educational or occupational admissions test shall be provided with a written notice which shall contain—

(1) a detailed description of the area of knowledge or the type of aptitude that the test attempts to analyze;

(2) in the case of a test of knowledge, a detailed description of the subjects to be tested;

(3) the margin of error or the extent of reliability of the test, determined on the basis of experimental uses of the test and, where available, actual usage;

(4) the manner in which the test results will be distributed by the testing entity to the applicant and to other persons; and

(5) a statement of the applicant's rights under subsection (b) of this section to obtain test results and related facts.

(b) Each individual who takes any educational or occupational admissions test shall, at the request of the test subject, promptly upon completion of scoring of such test, be notified of—

(1) the individual's specific performance in each of the subject or aptitude areas tested;

(2) how that specific performance ranked in relation to the other individuals and how the individual ranked on total test performance;

(3) the score required to pass the test for admission to such occupation or the score which is generally required for admission to institutions of higher education;

(4) any further information which may be obtained by the individual on request.

(c) No educational or occupational admissions test which tests knowledge or achievement (rather than aptitude) shall be graded (for purposes of determining the score required to pass the test for admission) on the basis of the relative distribution of scores of other test subjects.

SEC. 7. (a) Whenever any person has administered or there are reasonable grounds to believe that any person is about to administer any educational or occupational admissions test in violation of this Act, a civil action for preventive relief, including an application for a permanent or temporary

injunction, restraining order, or other order, may be instituted by the individual or individuals aggrieved. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of civil action without payment of fees, costs, or security.

(b) In any action commenced pursuant to this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this Act and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

SEC. 8. This Act shall be effective with respect to any test administered on or after January 1, 1979.

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APPENDIX B

96TH CONGRESS
1ST SESSION

H. R. 4949

To require certain information be provided to individuals who take standardized educational admissions tests, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 24, 1979

Mr. WEISS (for himself, Mrs. CHISHOLM, and Mr. MILLER of California) introduced the following bill; which was referred to the Committee on Education and Labor

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A BILL

To require certain information be provided to individuals who take standardized educational admissions tests, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Educational Testing Act of 1979".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress of the United States finds that—

(1) education is fundamental to the development of individual citizens and the progress of the Nation as a whole;

(2) there is a continuous need to ensure equal access for all Americans to educational opportunities of a high quality;

(3) standardized tests are a major factor in the admission and placement of students in postsecondary education and also play an important role in individuals' professional lives;

(4) there is increasing concern among citizens, educators, and public officials regarding the appropriate uses of standardized tests in the admissions decision of postsecondary education institutions;

(5) the rights of individuals and the public interest can be assured without endangering the proprietary rights of the testing agencies; and

(6) standardized tests are developed and administered without regard to State boundaries and are utilized on a national basis.

(b) It is the purpose of this Act—

(1) to ensure that test subjects and persons who use test results are fully aware of the characteristics, uses, and limitations of standardized tests in postsecondary education admissions;

(2) to make available to the public appropriate information regarding the procedures, development, and administration of standardized tests;

(3) to protect the public interest by promoting more knowledge about appropriate use of standardized test results and by promoting greater accuracy, validity, and reliability in the development, administration, and interpretation of standardized tests; and

(4) to encourage use of multiple criteria in the grant or denial of any significant educational benefit.

INFORMATION TO TEST SUBJECTS AND POSTSECONDARY EDUCATIONAL INSTITUTIONS

SEC. 3. (a) Each test agency shall provide to any test subject in clear and easily understandable language, along with the registration form for a test, the following information:

(1) The purposes for which the test is constructed and is intended to be used.

(2) The subject matters included on such test and the knowledge and skills which the test purports to measure.

(3) Statements designed to provide information for interpreting the test results, including explanations of the test, and the correlation between test scores and future success in schools and, in the case of tests used

for postbaccalaureate admissions, the standard error of measurement and the correlation between test scores and success in the career for which admission is sought.

(4) Statements concerning the effects on and uses of test scores, including—

(A) if the test score is used by itself or with other information to predict future grade point average, the extent, expressed as a percentage, to which the use of this test score improves the accuracy of predicting future grade point average, over and above all other information used; and

(B) a comparison of the average score and percentiles of test subjects by major income groups; and

(C) the extent to which test preparation courses improve test subjects' scores on average, expressed as a percentage.

(5) A description of the form in which test scores will be reported, whether the raw test scores will be altered in any way before being reported to the test subject, and the manner, if any, the test agency will use the test score (in raw or transformed form) by itself or together with any other information about the test subject to predict in any way the subject's future academic performance for any postsecondary educational institution.

(6) A complete description of any promises or covenants that the test agency makes to the test subject with regard to accuracy of scoring, timely forwarding or score reporting, and privacy of information (including test scores and other information), relating to the test subjects.

(7) The property interests of the test subject in the test results, if any, the duration for which such results will be retained by the test agency, and policies regarding storage, disposal, and future use of test scores.

(8) The time period within which the test subject's test score will be completed and mailed to the test subject and the time period within which such scores will be mailed to test score recipients designated by the test subject.

(9) A description of special services to accommodate handicapped test subjects.

(10) Notice of (A) the information which is available to the test subject under section 5(a)(2), (B) the rights of the test subject under section 6, and (C) the procedure for appeal or review of a test score by the test agency.

(b) Any institution which is a test score recipient shall be provided with the information required by subsection (a). The test agency shall provide such information with respect to any test prior to or coincident with the first reporting of a test score or scores for that test to a recipient institution.

(c) The test agency shall immediately notify the test subject and the institutions designated as test score recipients by the test subject if the test subject's score is delayed ten calendar days beyond the time period stated under subsection (a)(8) of this section.

REPORTS AND STATISTICAL DATA AND OTHER INFORMATION

SEC. 4. (a)(1) In order to further the purposes of this Act, the following information shall be provided to the Commissioner by the test agency:

(A) Any study, evaluation, or statistical report pertaining to a test, which a test agency prepares or causes to be prepared, or for which it provides data. Nothing in this paragraph shall require submission of any reports or documents containing information identifiable with any individual test subject. Such information shall be deleted or obliterated prior to submission to the Commissioner.

(B) If one test agency develops or produces a test and another test agency sponsors or administers the

same test, a copy of their contract for services shall be submitted to the Commissioner.

(2) All data, reports, or other documents submitted pursuant to this section will be considered to be records for purposes of section 552(a)(3) of title 5, United States Code.

(b) Within one year of the effective date of this Act, the Commissioners shall report to Congress concerning the relationship between the test scores of test subjects and income, race, sex, ethnic, and handicapped status. Such report shall include an evaluation of available data concerning the relationship between test scores and the completion of test preparation courses.

PROMOTING A BETTER UNDERSTANDING OF TESTS

SEC. 5. (a) In order to promote a better understanding of standardized tests and stimulate independent research on such tests, each test agency—

(1) shall, within thirty days after the results of any standardized test are released, file or cause to be filed in the office of the Commissioner—

(A) a copy of all test questions used in calculating the test subject's raw score;

(B) the corresponding acceptable answers to those questions; and

(C) all rules for transferring raw scores into those scores reported to the test subject and post-

secondary educational institutions together with an explanation of such rules; and

(2) shall, after the test has been filed with the Commissioner and upon request of the test subject, send the test subject—

(A) a copy of the test questions used in determining the subject's raw score;

(B) the test subject's individual answer sheet together with a copy of the correct answer sheet to the same test with questions counting toward the test subject's raw score so marked; and

(C) a statement of the raw score used to calculate the scores already sent to the test subject if such request has been made within ninety days of the release of the test score to the test subject.

The test agency may charge a nominal fee for sending out such information requested under paragraph (2) not to exceed the marginal cost of providing the information.

(b) This section shall not apply to any standardized test for which it can be anticipated, on the basis of past experience (as reported under section 7(2) of this Act), will be administered to fewer than five thousand test subjects nationally over a testing year.

(c) Documents submitted to the Commissioner pursuant to this section shall be considered to be records for purposes of section 552(a)(3) of title 5, United States Code.

PRIVACY OF TEST SCORES

SEC. 6. The score of any test subject, or any altered or transferred version of the score identifiable with any test subject, shall not be released or disclosed by the test agency to any person, organization, association, corporation, post-secondary educational institution, or governmental agency or subdivision unless specifically authorized by the test subject as a score recipient. A test agency may, however, release all previous scores received by a test subject to any currently designated test score recipient. This section shall not be construed to prohibit release of scores and other information in a form which does not identify the test subject for purposes of research leading to studies and reports primarily concerning the tests themselves.

TESTING COSTS AND FEES TO STUDENTS

SEC. 7. In order to ensure that tests are being offered at a reasonable cost to test subjects, each test agency shall report the following information to the Commissioner:

(1) Before March 31, 1981, or within ninety days after it first becomes a test agency, whichever is later, the test agency shall report the closing date of its testing year. Each test agency shall report any change in

the closing date of its testing year within ninety days after the change is made.

(2) For each test program, within one hundred and twenty days after the close of the testing year the test agency shall report—

(A) the total number of times the test was taken during the testing year;

(B) the number of test subjects who have taken the test once, who have taken it twice, and who have taken it more than twice during the testing year;

(C) the number of refunds given to individuals who have registered for, but did not take, the test;

(D) the number of test subjects for whom the test fee was waived or reduced;

(E) the total amount of fees received from the test subjects by the test agency for each test program for that test year;

(F) the total amount of revenue received from each test program; and

(G) the expenses to the test agency of the tests, including—

(i) expenses incurred by the test agency for each test program;

(ii) expenses incurred for test development by the test agency for each test program; and

(iii) all expenses which are fixed or can be regarded as overhead expenses and not associated with any test program or with test development;

(3) If a separate fee is charged test subjects for admissions data assembly services or score reporting services, within one hundred and twenty days after the close of the testing year, the test agency shall report—

(A) the number of individuals registering for each admissions data assembly service during the testing year;

(B) the number of individuals registering for each score reporting service during the testing year;

(C) the total amount of revenue received from the individuals by the test agency for each admissions data assembly service or score reporting service during the testing year; and

(D) the expenses to the test agency for each admissions data assembly service or score reporting service during the testing year.

REGULATIONS AND ENFORCEMENT

SEC. 8. (a) The Commissioner shall promulgate regulations to implement the provisions of this Act within one hundred and twenty days after the effective date of this Act. The failure of the Commissioner to promulgate regulations shall not prevent the provisions of this Act from taking effect.

(b) Any test agency that violates any clause of any provision of this Act shall be liable for a civil penalty not to exceed $2,000 for each violation.

(c) If any provision of this Act shall be declared unconstitutional, invalid, or inapplicable, the other provisions shall remain in effect.

DEFINITIONS

SEC. 9. For purposes of this Act—

(1) the term "admissions data assembly service" means any summary or report of grades, grade point averages, standardized test scores, or any combination of grades and test scores, of an applicant used by any postsecondary educational institution in its admissions process;

(2) the term "Commissioner" means the Commissioner of Education;

(3) the term "postsecondary educational institution" means any institution providing a course of study

beyond the secondary school level and which uses standardized tests as a factor in its admissions process;

(4) the term "score reporting service" means the reporting of a test subject's standardized test score to a test score recipient by a testing agency;

(5) the term "standardized test" or "test" means—

(A) any test that is used, or is required, for the process of selection for admission to postsecondary educational institutions or their programs, or

(B) any test used for preliminary preparation for any test that is used, or is required, for the process of selection for admission to postsecondary educational institutions or their programs,

which affects or is conducted or distributed through any medium of interstate commerce, but such term does not include any test designed solely for nonadmission placement or credit-by-examination or any test developed and administered by an individual school or institution for its own purposes only;

(6) the term "test agency" means any person, organization, association, corporation, partnership, or in-

dividual which develops, sponsors, or administers a standardized test;

(7) the term "test preparation course" means any curriculum, course of study, plan of instruction, or method of preparation given for a fee which is specifically designed or constructed to prepare a test subject for, or to improve a test subject's score on, a standardized test;

(8) the term "test program" means all the administrations of a test of the same name during a testing year;

(9) the term "test score" means the value given to the test subject's performance by the test agency on any test, whether reported in numerical, percentile, or any other form.

(10) the term "test score recipient" means any person, organization, association, corporation, postsecondary educational institution, or governmental agency or subdivision to which the test subject requests or designates that a test agency reports his or her score;

(11) the term "test subject" means an individual to whom a test is administered; and

(12) the term "testing year" means the twelve calendar months which the test agency considers either its operational cycle or its fiscal year.

EFFECTIVE DATE

SEC. 10. This Act shall take effect one hundred and eighty days after the date of its enactment.

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APPENDIX C

CALIFORNIA

AMENDED IN ASSEMBLY AUGUST 14, 1978

AMENDED IN SENATE JUNE 14, 1978

AMENDED IN SENATE MAY 31, 1978

AMENDED IN SENATE MAY 9, 1978

AMENDED IN SENATE MAY 1, 1978

SENATE BILL NO. 2005

Introduced by Senator Dunlap

March 29, 1978

78

An act to add Chapter 3 (commencing with Section 99150) to Part 65 of the Education Code, and to amend Section 6254 of the Government Code, relating to postsecondary education.

LEGISLATIVE COUNSEL's DIGEST

SB 2005, as amended, Dunlap. Postsecondary education: standardized tests.

Existing law does not regulate the activities of testing services which prepare and administer standardized tests for various purposes related to education.

This bill would require such testing services, defined generally as test sponsors, to make various reports to the

California Postsecondary Education Commission regarding the administration and use of standardized tests to California inhabitants. Such reports would relate to both the operation and charges for the services. Such material would be subject to disclosure under the California Public Records Act. Test sponsors would also be required to file copies of specified test questions and answers with the commission.

This bill would require test sponsors to file certain information sufficient to describe the psychometric quality of the test.

This bill would require test sponsors to notify California test subjects regarding the purposes of the test, the subject matter of the test, the manner in which the test is scored, the manner in which the test scores will be recorded, the basis upon which scores will be made available, and a sample of test items.

This bill would make any test sponsor who intentionally violates the bill liable for a civil penalty of not to exceed $750 for each violation.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that:

(a) Because standardized tests often play a major

role in the admission, placement, and evaluation of students at all levels of our educational system, students, parents, and the general public have the right to know and to understand the nature, purposes, limitations, uses and potentials of all kinds and types of standardized tests and test procedures.

(b) Standardized tests cannot measure with absolute precision every attribute pertinent to success in postsecondary education. As such, they have the potential of narrow interpretation and misuse.

(c) Since various ethnic, regional, racial, and economic groups may not test equally well on standardized tests, and since these tests play an important role in determining students' personal and professional lives, careful consideration should be given to the effects which standardized tests have upon the accessibility of equal educational opportunities to all segments of the population.

(d) It is in the public interest to insure the maintenance of high standards of quality in the development, administration, and interpretation of standardized tests.

It is, therefore, the intent of the Legislature in enacting this chapter to make test subjects and persons who use such test results more fully aware of the characteristics, uses, limitations, and potential misuses of tests in education, to make available to the public

appropriate information regarding the policies, operations, and fee structure of the limited number of organizations that develop and administer standardized tests, and to allow students, educators and public officials to scrutinize the production and administration of standardized tests.

SEC. 2. Chapter 3 (commencing with Section 99150) is added to Part 65 of the Education Code, to read:

CHAPTER 3. STANDARDIZED TESTS

99150. As used in this chapter:

(a) "Admissions data assembly service" means any summary or report of grades, grade point averages, or standardized test scores of an applicant used by any postsecondary educational institution in its admissions process.

(b) "Commission" means the California Postsecondary Education Commission.

(c) "Secure test" means any test which contains items not available to the public and which, to allow the further use of test items and to protect the validity and reliability of the test, is subject to special security procedures in its publication, distribution, and administration.

(d) "Standardized test" or "test", for purposes of this chapter, means any test administered in California to at least 3,000 individuals during a testing year and which is formally required by institutions of postsecondary

education for the purposes of admissions to those institutions.

"Standardized test" or "test" does not include a test, or part of a test, which is administered to a selected group of individuals solely for research, pre-test, guidance, counseling, or placement purposes, for credit-by-examination purposes, or for purposes of meeting graduation requirements of secondary schools. Tests which are administered as supplements or auxiliaries to another test, or which form a specialized component of a test, may be combined for the purposes of this chapter.

(e) "Test subject" means an individual to whom a standardized test is administered and who takes the test at a location in the State of California.

(f) "Test sponsor" means an individual, partnership, corporation, association, company, firm, institution, society, trust, or joint stock company which sponsors a standardized test.

(g) "Testing year" means the 12 calendar months which the test sponsor considers either its operational cycle or its fiscal year.

99151. Each test sponsor shall report the closing date of its testing year to the commission by March 31, 1979, or within 90 days after it first becomes a test sponsor, whichever is later.

Each test sponsor shall report any change in the closing

date of its testing year within 90 days after the change is made.

99152. Within 90 days of the close of each testing year, the test sponsor shall file in the office of the commission five copies of the test which is equivalent to that in use in any of the prior three testing years, but that is no longer in use as a secure test, along with the corresponding acceptable answers.

If such a test is not available, then the test sponsor shall file instead a set of test questions which are not derived from a secure test and which are equivalent in content and of sufficient number to represent the secure test fairly, along with corresponding acceptable answers.

99153. (a) Within 90 days of the close of each testing year, the test sponsor shall file in the office of the commission standard technical data sufficient to describe the psychometric quality of the test.

For purposes of compliance with this section, it is sufficient to deposit with the commission information conforming to the guidelines specified in the Standards for Educational and Psychological Tests of the American Psychological Association, which were in effect 180 days prior to the testing year, and which are appropriate to the particular test and its uses.

(b) Data, reports or other documents submitted pursuant

to this section shall be accompanied by a description of the test, including, but not limited to the title, purpose or purposes of the test and, when and where the test was administered in the state.

(c) No data, reports or other documents submitted pursuant to this chapter shall contain information in a form identifiable with individuals or particular post-secondary educational institutions.

99154. (a) Within 135 days after the close of the testing year, each test sponsor shall report the following data on test takings, wherever they may occur, to the commission:

(1) The total number of times the test was taken during the testing year.

(2) The number of individuals who have taken the test once, who have taken it twice, and who have taken it more than twice during the testing year.

(3) The number of individuals who registered for, but did not take, the test.

(4) The total amount of fees received from test-takers by the test sponsor for the test for that testing year.

(5) The expenses to the test sponsor of the test, as follows:

(A) Those expenses which are directly attributable to the test.

(B) Those expenses which are indirectly attributable to the test. However, if the test sponsor also sponsors another test or related activities, it shall be sufficient for compliance with provisions of this section for the test sponsor to list indirectly attributable expenses, to the extent that they are identifiable, as they are proportionately related to the test. The test sponsor shall also list expenses indirectly attributable to all activities of the test's sponsor, including expenses not identifiable as attributable to a test.

(b) The financial disclosure required by this section shall be submitted in sufficient detail to indicate the major categories of revenues and expenses associated with the test. Except as provided in this section, the information for different tests administered by the same test sponsor shall be reported separately and by individual test.

99155. If a separate fee is charged test subjects for admissions data assembly services, then the test sponsor shall report information concerning the data assembly services in substantially the same form as would be required for a test under Section 99154.

99156. Any information or report required to be made or filed with the commission under this chapter is a public record subject to disclosure under the California Public Records Act, Chapter 3.5 (commencing with Section 6250)

of Division 7 of Title 1 of the Government Code.

Nothing in this section shall be construed to diminish or authorize the infringement of any rights protected by laws relating to copyright, to the protection of trade secrets, or to other proprietary rights.

99157. Each test sponsor shall provide the following information to test subjects prior to the administration of a test:

(a) The purposes for which the test is constructed and is intended to be used.

(b) The subject matters included on such test and the knowledge and skills which the test purports to measure.

(c) The manner in which the test is scored and the relationship of the raw and scaled scores to the skills and knowledge it measures.

(d) The basis upon which such scores will be made available to persons or institutions.

(e) A representative set of sample test items.

99158. In reporting test scores to test subjects, the test sponsor shall provide sufficient explanatory information to facilitate proper interpretation of the score or scores. The information shall be distributed in the following manner:

(a) Test subjects shall be provided with statements designed to provide information for interpreting the scores, including, but not limited to, explanations of:

(1) The test score scale.

(2) The scores and their meanings.

(3) Standard error of measurement of the test.

(b) Any postsecondary education institution or other organization which a test subject designates as a test score recipient shall be provided with all of the information specified in Section 99157 and in subdivision (a) of this section. The test sponsor shall provide such information prior to or coincident with the first reporting of a test score or scores to a recipient during a testing year. Such information shall be provided to the commission prior to or coincident with the first reporting of test scores to any test score recipient during a testing year.

The test sponsor shall provide such information once during a testing year in a manner deemed sufficient to assure access to the information by interested parties.

99159. (a) In addition to the information required pursuant to subdivision (b) of Section 99158, the test sponsor shall submit to the parties listed therein and to the commission the test sponsor's most recent national or regional aggregation of data concerning the predictive validity of:

(1) Academic record or grades alone.

(2) Standardized test score alone.

(3) Academic record and test score combined.

(b) The data shall be disseminated pursuant to subdivision (b) of Section 99158.

99160. Any test sponsor who intentionally violates any provision of this chapter shall be liable for a civil penalty not to exceed seven hundred fifty dollars ($750) for each violation.

SEC. 3. Section 6254 of the Government Code is amended to read:

6254. Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are:

(a) Preliminary drafts, notes, or interagency or intra-agency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure;

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810) of Title 1 of the Government Code, until such litigation or claim has been finally adjudicated or otherwise settled;

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy;

(d) Contained in or related to:

(1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies;

(2) Examination, operating, or condition reports prepared by, on behalf of, or for the use of any state agency referred to in subdivision (1);

(3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of any state agency referred to in subdivision (1); or

(4) Information received in confidence by any state agency referred to in subdivision (1).

(e) Geological and geophysical data, plant production data and similar information relating to utility systems development, or market or crop reports, which are obtained in confidence from any person;

(f) Records of complaints to or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local police agency, or any such investigatory or security files compiled by any other

state or local agency for correctional, law enforcement or licensing purposes, except that local police agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the persons involved in an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage as the result of the incident caused by arson, burglary, fire, explosion, robbery, vandalism, or a crime of violence as defined by subdivision (b) of Section 13960, unless the disclosure woudl endanger the safety of a witness or other person involved in the investigation, disclosure would endanger the succesful completion of the investigation or a related investigation;

(g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination, except as provided for in Chapter 3 (commencing with Section 99150) of Part 65 of the Education Code;

(h) The contents of real estate appraisals, engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until such time as all of the property has been acquired or all of the contract agreement obtained, provided, however, the law of eminent domain shall not be affected by this provision;

(i) Information required from any taxpayer in connection with the collection of local taxes which is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying such information;

(j) Library and museum materials made or acquired and presented solely for reference or exhibition purposes;

(k) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege;

(l) Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's legal affairs secretary, provided public records shall not be transferred to the custody of the Governor's legal affairs secretary to evade the disclosure provisions of this chapter;

(m) In the custody or maintained by the Legislative

Counsel;

(n) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with such licensing agency to establish his personal qualification for the license, certificate, or permit applied for; and

(o) Financial data contained in applications for financing under Division 27 (commencing with Section 44500) of the Health and Safety Code, where an authorized officer of the California Pollution Control Financing Authority determines that disclosure of such financial data would be competitively injurious to the applicant and such data is required in order to obtain guarantees from the United States Small Business Administration. The California Pollution Control Financing Authority shall adopt rules for review of individual requests for confidentiality under this section and for making available to the public those portions of an application which are subject to disclosure under this chapter.

Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.

SEC. 4. It is the intent of the Legislature that the information disclosure requirements of this act be

applicable to the entire testing year ending in 1979.

APPENDIX D

STATE OF NEW YORK

S. 5200-A A. 7668-A

CAL. No. 1215

1979-1980 REGULAR SESSIONS

SENATE - ASSEMBLY

April 26, 1979

IN SENATE - Introduced by Sens. LaVALLE, ACKERMAN, BABBUSH, BARTOSIEWICZ, BEATTY, BERMAN, BERNSTEIN, BRUNO, CAEMMERER, CONNOR, FLYNN, GALIBER, GOODHUE, HALPERIN, LACK, LEICHTER, MARKOWITZ, McCALL, MEGA, MENDEZ, OWENS, PADAVAN, PISANI, PRESENT, RUIZ, SOLOMON, TAURIELLO, TRUNZO, VOLKER, WINIKOW - read twice and ordered printed, and when printed to be committed to the Committee on Education - reported favorably from said committee and committed to the Committee on Higher Education - reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading.

IN ASSEMBLY - Introduced by COMMITTEE ON RULES - (at request of M. of A. Vann, LaFayette, Bianchi, Boyland, Cochrane, Cooperman, Eve, Farrell, Flanagan, Fortune, Gottfried, Grannis, Griffith, Harenberg, Hinchey, Hirsch, Hochbrueckner, Howard, Jacobs, Jenkins, Koppell, Lentol, Lewis, Lipschutz, McCabe, G.W. Miller, Nine, Passannante, Pesce, Proud, Serrano, Siegel, E.C. Sullivan, Virgilio, D.B. Walsh, Yevoli, Zagame) - read once and referred to the Committee on Higher Education - reported and referred to the Committee on Ways and Means - committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the education law, in relation to standardized testing

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The education law is amended by adding a new article seven-A to read as follows:

ARTICLE 7-A

STANDARDIZED TESTING

Section 340. Definitions.
341. Background reports and statistical data.
342. Disclosure of test contents.
343. Notice.
344. Disclosure of test scores.
345. Regulations.

346. Violations.

347. Severability.

§ 340. Definitions. As used in this article:

1. "Standardized test" or "test" means any test that is given at the expense of the test subject and designed for use or used in the process of selection for post-secondary or professional school admissions. Such tests shall include, but are not limited to, the Preliminary Scholastic Aptitude Test, Scholastic Aptitude Test, ACT Assessment, Graduate Record Examination, Medical College Admission Test, Law School Admission Test, Dental Admission Testing Program, Graduate Management Admission Test, and Miller Analogies Test. This article shall not apply to any state, federal, or local civil service test, any test designed and used solely for non-admission placement or credit-by-examination, or any test developed and administered by an individual school or institution for its own purposes only.

2. "Commissioner" means the commissioner of education of the State of New York.

3. "Test subject" shall mean an individual to whom a test is administered.

4. "Test agency" shall mean any organization, association, corporation, partnership, or individual or person that develops, sponsors or administers a test.

§ 341. Background reports and statistical data.

1. Whenever any test agency prepares, causes to have prepared or provides the data which are used in any study, evaluation or statistical report pertaining to a test, such study, evaluation or report shall be filed with the commissioner.

2. If any reports or other documents submitted pursuant to this section contains information identifiable with any individual test subject, such information shall be deleted or obliterated prior to submission.

3. All data, reports or other documents submitted pursuant to this section shall be public records.

§ 342. Disclosure of test contents. 1. Within thirty days after the results of any standardized test are released, the test agency shall file or cause to be filed in the office of the commissioner:

a. a copy of all test questions used in calculating the test subject's raw score;

b. the corresponding acceptable answers to those questions; and

c. all rules for transferring raw scores into those scores reported to the test subject together with an explanation of such rules.

2. After the test has been filed with the commissioner, and upon the request of the test subject, the test agency

shall send to the test subject:

a. a copy of the test questions used in determining the subject's raw score;

b. the subject's individual answer sheet together with a copy of the correct answer sheet to the same test with questions counting toward the subject's raw score so marked; and

c. a statement of the raw score used to calculate the scores already sent to the subject, provided that such request has been made within ninety days of the release of the test score to the test subject.

The agency may charge a nominal fee for sending out such information, not to exceed the direct cost of providing the information.

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3. This section shall not apply to College Board Achievement Tests or GRE Advanced Tests.

4. Documents submitted to the commissioner pursuant to this section shall be public records.

§343. Notice 1. Each test agency shall provide, along with the registration form for a test, the following information:

a. The purposes for which the test is constructed and is intended to be used.

b. The subject matters included on such test and the knowledge and skills which the test purports to measure.

c. Statements designed to provide information for interpreting test results, including but not limited to, explanations of the test score scale, the standard error of measurement of the test, and a list of available correlations between test scores and grades, successful completion of a course of study and parental income.

d. How the test scores will be reported, whether the raw test scores will be altered in any way before being reported to the test subject and whether and how the test agency will use the test score in raw or transformed form by itself or together with any other information about the test subject to predict in any way the subject's future academic performance for any post secondary educational institution.

e. A complete description of any promises or covenants that the test agency makes to the test subject with regard to accuracy of scoring, timely forwarding of information, policies for notifying test subjects regarding inaccuracies in scoring or score reporting and privacy of information relating to the test subject.

f. Whether or not test scores are the property of the test subject, how long they will be retained by the test agency, and policies regarding storage, disposal and future use of test score data.

2. Any institution which is a test score recipient shall be provided with the information specified in this section. The test agency shall provide such information prior to or coincident with the first reporting of a test score or scores to a recipient institution. Such institution shall be encouraged to provide interpretive processing by qualified personnel where such personnel are available.

§ 344. Disclosure of test scores. The score of any test subject shall not be released or disclosed by the test agency to any person, organization, corporation, association, college, university, or governmental agency or subdivision unless specifically authorized by the test subject. A test agency may, however, release all previous scores received by a test subject on a test to anyone designated by the test subject to receive the current score.

This section shall not be construed to prohibit release of scores and other information in the possession of a test agency for purposes of research leading to studies and reports concerning the tests themselves. Such studies and reports must contain no information identifiable with any individual test subject.

§ 345. Regulations. The commissioner shall promulgate regulations to implement the provisions of this article.

§ 346. Violations. Any test agency which violates any section of this article shall be liable for a civil penalty of not more than five hundred dollars for each violation.

§ 347. Severability. If any provision of this article shall be declared unconstitutional or invalid, the other provisions shall remain in effect notwithstanding.

§ 2. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law.

The Education Commission of the States is a nonprofit organization formed by interstate compact in 1966. Forty-seven states, American Samoa, Puerto Rico and the Virgin Islands are now members. Its goal is to further a working relationship among governors, state legislators and educators for the improvement of education. This report is an outcome of one of many commission undertakings at all levels of education. The commission offices are located at Suite 300, 1860 Lincoln Street, Denver, Colorado 80295.

It is the policy of the Education Commission of the States to take affirmative action to prevent discrimination in its policies, programs and employment practices.